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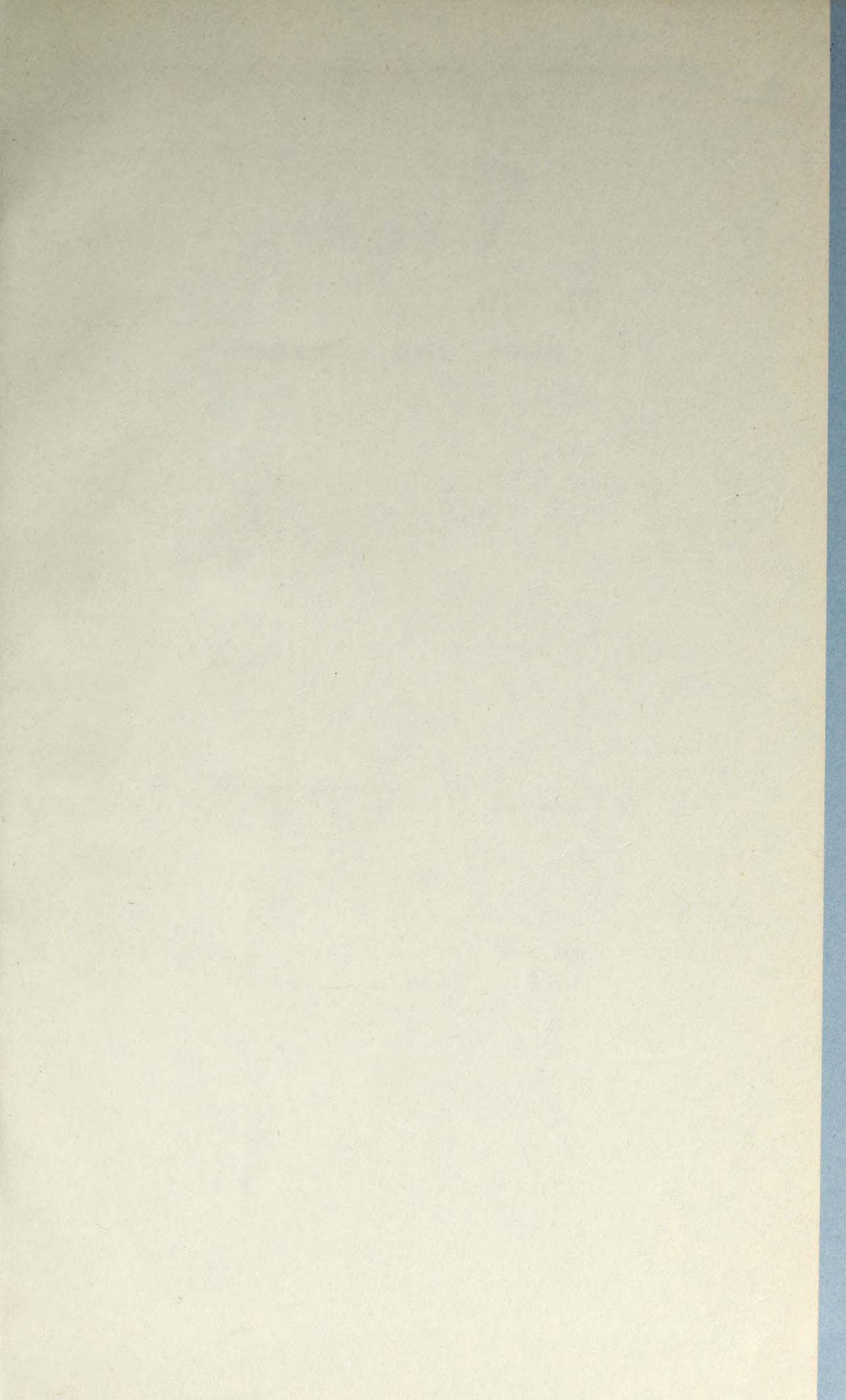
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No. 13765

United States
Court of Appeals
for the Ninth Circuit

G. L. THOMPSON, as Trustee in Bankruptcy of
the Union Lead Mining and Smelter Company,
bankrupt, Appellant,

vs.

R. H. DACHNER, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division.

FILED

OCT 23 1953

PAUL P. O'BRIEN
CLERK

No. 13765

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NAMES AND ADDRESSES OF ATTORNEYS

ALEX L. ARGUELLO, Esq.,

369 Pine Street, Penthouse,
San Francisco 4, California,

Attorney for Appellant.

HELLER, EHRMAN, WHITE & McAULIFFE,

14 Montgomery Street,
San Francisco, California,

Attorneys for Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 39,899

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, Bankrupt,

G. L. THOMPSON, as Trustee in Bankruptcy of
Union Lead Mining and Smelter Company,
Bankrupt, Petitioner,

vs.

R. H. DACHNER, Respondent.

PETITION FOR ANCILLARY
ADMINISTRATION

The Petition of G. L. Thompson, as Trustee in Bankruptcy for the above-named bankrupt respectfully represents:

I.

That the above-named Union Lead Mining and Smelter Company was duly adjudicated a bankrupt on February 9, 1948, on a petition filed in the District Court of the United States for the District of Nevada on February 7, 1948.

II.

That on February 9, 1948, the District Judge for the United States District Court for the District of Nevada made an order of reference referring the above-entitled matter to the Referee in Bankruptcy for said Court.

III.

That Frank W. Ingram is the duly appointed, acting and qualified Referee in Bankruptcy for the United States District Court for the District of Nevada.

IV.

That your petitioner is the Trustee of the estate of said bankrupt by an appointment dated February 6, 1951 and by an order approving said Trustee's bond dated February 7, 1951, said appointment and said order issuing out of the District Court of the United States for the District of Nevada.

V.

That by a petition filed on the 10th day of May, 1951 your petitioner, in a petition directed to the Referee in Bankruptcy of the District Court of the United States for the District of Nevada petitioned said Referee for an order granting your petitioner authority to commence all proper and convenient ancillary proceedings against said R. H. Dachner.

VI.

That by an order dated the 10th day of May, 1951 Frank W. Ingram, Referee in Bankruptcy of the District Court of the United States for the District of Nevada ordered that your petitioner be given, and then was given authority and power to commence, maintain and prosecute ancillary proceedings against the said R. H. Dachner for the sum of \$26,266.81 together with interest on said sum in the United States District Court for the Northern

District of California, Southern Division, or in any other United States District Court in whose District the said R. H. Dachner may be found and served or in whose District said \$26,266.81 or any part of said sum may be found, said order being attached hereto and made a part hereof.

VII.

That at the time of filing said petition in bankruptcy one R. H. Dachner had in his possession or under his control \$26,266.81 belonging to the bankrupt estate, which said R. H. Dachner received from the bankrupt on the 20th day of November, 1947.

VIII.

That at the time of filing said petition said R. H. Dachner had no claim adverse to your petitioner to said \$26,266.81 and at most had only a colorable claim to said sum.

IX.

That said R. H. Dachner now has in his possession or under his control \$26,266.81.

X.

That your petitioner has made demand upon R. H. Dachner for the surrender and possession of said \$26,266.81 and that said R. H. Dachner has failed and refused to comply with such demand.

XI.

That on the 20th day of November, 1947, R. H. Dachner obtained a lien upon \$26,266.81 belonging to the bankrupt estate.

XII.

That on the 20th day of November, 1947 the Union Lead Mining and Smelter Company, Bankrupt was insolvent.

XIII.

That R. H. Dachner now has in his possession or under his control \$26,266.81 obtained by him by reason of the lien set out in Paragraph XI of this Petition, which lien was secured by the enforcement of an execution given on a judgment issuing out of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, which judgment was reversed by the Supreme Court of the State of Nevada by a judgment entered in said Court on the 25th day of June, 1948.

XIV.

That said R. H. Dachner obtained said \$26,266.81 in fraud of the provisions of the Bankruptcy Act.

Wherefore, your petitioner prays:

1. That the said R. H. Dachner be directed forthwith to surrender possession of said \$26,266.81 together with interest thereon, and that your petitioner have such other and further relief as is just.

2. That this Court enter an order referring the matter to the Referee in Bankruptcy for this Court and further order said Referee to assume summary jurisdiction of said matter and to conduct summary hearings in said matter in regard to said \$26,266.81.

3. For an order directing the Clerk to issue a Subpoena commanding said R. H. Dachner to ap-

pear before the Referee in Bankruptcy for this Court at a time and place to be set by said Referee and requiring said R. H. Dachner to show cause why he should not turn over to the Trustee said \$26,266.81.

4. For an order directing the Clerk of this Court to issue all necessary Subpoenae and Summons which may be required in the necessary and convenient maintenance and prosecution of the above-entitled matter as regards said \$26,266.81.

Dated: This 5th day of June, 1951.

STEWART and HORTON,
Attorneys for G. L. Thompson, Trustee in Bankruptcy for Union Lead Mining and Smelter Company, Bankrupt,

/s/ By ROYAL A. STEWART,
Of Counsel for Petitioner G. L.
Thompson and

ALEX L. ARGUELLO,
Special Counsel for G. L. Thompson,
Trustee,

/s/ ALEX L. ARGUELLO

Duly Verified.

[Endorsed]: Filed June 18, 1951.

In the District Court of the United States
For the District of Nevada

In Bankruptcy—No. 743 A-58-A

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, A Nevada Corpora-
tion, Bankrupt.

ORDER

Upon the Petition of the Trustee in the Above-Entitled Matter, and it Further Appearing as Follows:

1. That the above-named Union Lead Mining and Smelter Company was duly adjudicated a bankrupt on February 9th, 1948, on a voluntary petition filed in this Court by said Company on February 7th, 1948;

2. That the petitioner is the Trustee of the estate of said bankrupt by an appointment dated February 6th, 1951, and an order approving said Trustee's bond dated February 7th, 1951, issued out of this Court;

3. That at the time of the filing of said petition in bankruptcy one R. H. Dachner had in his possession or under his control \$26,266.81 belonging to said estate;

4. That on the 20th day of November, 1947, said R. H. Dachner received \$26,266.81 belonging to said estate under an execution given upon a judgment issuing out of the Second Judicial District Court of the State of Nevada in and for the County of

Washoe; that at the time of said execution of said judgment said bankrupt was insolvent, and that said execution was in fraud of the provisions of the Bankruptcy Act, and which judgment was reversed by the Supreme Court of the State of Nevada during this bankruptcy;

5. That the said R. H. Dachner now has in his possession or under his control \$26,266.81;

6. That the petitioner as Trustee in Bankruptcy is entitled to the immediate possession of said \$26,266.81;

7. That the petitioner petitioned this Court for a turn-over order against the said R. H. Dachner for said \$26,266.81, but that the said turnover order and said petition was refused on the basis that the said R. H. Dachner was not served within the territorial limits of this Court;

8. That the said R. H. Dachner is not a resident of the State of Nevada and is not subject to the service of process within the territorial limits of this Court; and,

9. It appearing necessary for the production of the creditors of said estate and for the collection of the assets of said estate;

It Is Hereby Ordered that the Trustee be given, and he hereby is given, authority and power to commence, maintain and prosecute ancillary proceedings against the said R. H. Dachner for the sum of \$26,266.81, together with interest on said sum, in the United States District Court for the Northern District of California, Southern Division, or in any other United States District Court in whose

District the said R. H. Dachner may be found and served, or in whose District said \$26,266.81 or any part of said sum may be found.

Dated at Reno, Nevada, this 10th day of May, 1951.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy.

I certify that the foregoing is a true and correct copy of the original on file and of record in the office of Referee in Bankruptcy for the District of Nevada.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

[Endorsed]: Filed May 10, 1951.

[Title of District Court and Cause No. 39,899.]

ORDER

The verified Petition of G. L. Thompson, as Trustee in Bankruptcy for the above-named bankrupt having been filed in the above-entitled Court and sufficient cause appearing, the above-entitled Court hereby assumes ancillary jurisdiction of the above-entitled matter for the purpose of hearing and determining the matters set forth in said petition and hereby orders:

1. That R. H. Dachner show cause before the Honorable Burton J. Wyman, Referee in Bank-

ruptcy at a time and place to be set by said Referee why he should not forthwith surrender possession of said \$26,266.81 together with interest thereon and why this Court should not grant said petitioner such other and further relief as is just, and it is further,

2. Ordered that the above-entitled matter be, and hereby is referred to the Honorable Burton J. Wyman, Referee in Bankruptcy for the purpose of summarily hearing and determining the matters set forth in said petition; and it is further ordered

3. That the Clerk of the above-entitled Court be, and hereby is ordered to issue any necessary process at the request of said Referee commanding said R. H. Dachner to appear before said Referee at a time and place to be set by said Referee and requiring said R. H. Dachner to show cause why he should not turn over to the Trustee the sum set out in said petition; and further ordering

4. That the Clerk of the above-entitled Court issue all other subpoenae and summons which may be required in the necessary and convenient maintenance, prosecution and determination of the above-entitled matter before said Referee.

Dated: This 18th day of June, 1951.

/s/ EDWARD P. MURPHY,
District Judge

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

At San Francisco, California, in said District,
on the 18th day of June, 1951.

Upon the Annexed Petition of G. L. Thompson,
the Trustee of the estate of the above-named Bank-
rupt, verified the 5th day of June, 1951, and filed
on the 18th day of June, 1951;

It Is Hereby Ordered that R. H. Dachner show
cause before this Court in Room 609 Grant Build-
ing, 1095 Market Street, in the City and County of
San Francisco, State of California, on the 26th day
of July, 1951, at the hour of 2:00 o'clock p.m., or
as soon thereafter as the matter may be heard, why
an order should not be entered upon him requiring
him to turn over to the said Trustee the funds
set out in the said annexed petition, namely, the
sum of \$26,266.81, with interest; and,

It Is Further Ordered that service of this order
and the annexed petition upon the said R. H.
Dachner on or before the 28th of June, 1951, shall
be sufficient.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

ANSWER OF RESPONDENT TO PETITION
FOR ANCILLARY ADMINISTRATION
AND TO ORDER TO SHOW CAUSE WHY
AN ORDER SHOULD NOT BE ENTERED
REQUIRING RESPONDENT TO TURN
OVER CERTAIN FUNDS

To Burton J. Wyman, Esquire, Referee in Bankruptcy:

R. H. Dachner, respondent herein, answers the petition of G. L. Thompson filed on June 18, 1951, praying for a turnover of certain funds, and respondent also answers the order requiring him to show cause why an order should not be made directing him to turn over certain funds, as follows:

First Defence

The petition fails to state a claim against respondent upon which relief can be granted.

Second Defence

This court lacks jurisdiction of the subject matter of the action in that respondent's claim to the funds here involved is an adverse and valid claim, which claim thereby ousts the Bankruptcy Court of the summary jurisdiction which the petitioner here seeks to invoke, to determine actual controversies over title to property not in the hands of the bankrupt.

Third Defence

Respondent denies each and every, all and singular, the allegations contained in paragraphs 7, 8,

11, 12 and 14 of the petition for ancillary administration.

With respect to the allegations contained in paragraph 13 of said petition, respondent admits that he secured the said Twenty-six Thousand Two Hundred Sixty-six and 81/100ths Dollars (\$26,266.81) by execution on a judgment of the District Court for the Second Judicial District of Nevada, and that said judgment was reversed and remanded to said trial court by the Supreme Court of Nevada.

Respondent also alleges that the said trial court, on the remand of the case, entered a judgment of dismissal on the motion of plaintiff in said action (respondent herein) because the trial court found that the said action had been fully compromised and settled and that neither party had any claim against the other after said settlement. Said judgment of dismissal is now on appeal to the Supreme Court of Nevada and has been set down for oral argument before said court on September 4, 1951.

Fourth Defence

Respondent denies that Union Lead Mining and Smelter Company was insolvent on November 20, 1947 or at any time prior or subsequent thereto, and respondent also alleges that in any event he had no knowledge of the alleged insolvency of Union Lead Mining and Smelter Company, nor any reasonable cause to believe said corporation was insolvent or respondent's receipt of the sum obtained by execution would effect, or result in, a preference.

On the contrary, respondent alleges that on the

20th day of November, 1947 and for some time prior thereto he knew that Union Lead Mining and Smelter Company had, on the 27th day of August, 1947 sold all of its assets to Imperial Lead Mines, Incorporated for the sum of Two Hundred Seventy-five Thousand and no/100ths Dollars (\$275,000.00).

/s/ HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Respondent

[Printer's Note: The Attached Petition for Ancillary Administration and Order is a duplicate set out at pages 3 to 10 of this printed Record.]

Acknowledgment of Service attached.

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

PETITION TO REVIEW REFEREE'S
ORDER

To: The Honorable Burton J. Wyman, Referee in
Bankruptcy:

The petition of G. L. Thompson, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, bankrupt, respectfully represents:

I.

Your petitioner is aggrieved by the order herein of the Honorable Burton J. Wyman, Referee in Bankruptcy, dated March 12, 1952, copy of which

order is annexed hereto, marked Exhibit A, and made a part hereof.

II.

That the time within which your petitioner might seek a writ of review from said order was duly and regularly extended by the aforementioned Referee in Bankruptcy until the 22nd day of April, 1952.

III.

The Referee erred in respect to said order in that the Referee received in evidence and considered respondent's Exhibit 1 (Transcript, p. 22), over petitioner's objection (Transcript, p. 20-21), and the Referee likewise erred in considering such exhibit for more than the limited purpose for which it was offered, namely:

“For the judgment in the second case.”
(Transcript, p. 20).

IV.

That the Referee erred in receiving in evidence the respondent's Exhibit 2 (Transcript, p. 27), over the objection of petitioner made at (Transcript, p. 22), and in considering such exhibit for more than the limited purpose for which it was offered, namely:

“To demonstrate * * * that there was no insolvency.” (Transcript, p. 23);

“And to show knowledge of the Trustee of the state court proceeding.” (Transcript, p. 23.)

V.

That the Referee erred in respect to said order in that the only and sole basis for said order in fact rests upon such evidence erroneously received as set forth in the two preceding paragraphs hereof.

VI.

That the Referee erred in respect to said order in that the entire historical background, as set forth in the Referee's opinion commencing at page 4 thereof, down to and including line 10 of page 7 thereof, is wholly and entirely without support in the record of any evidence which the Court could lawfully consider.

VII.

That the Referee erred in failing to find, upon the uncontroverted evidence, that no appearance was ever made by the Trustee in any of the state court actions and that there was **no order ever issued** out of the Federal Court directing such appearance and that there was no order entered in either the bankruptcy or the reorganization proceedings allowing the Dachner claim to be litigated in the state court (Trustee's Exhibits 4, 5 and 6).

VIII.

That the Referee erred in respect to said order, in that said Referee found that said R. H. Dachner did not have under his control any part of the assets of the bankrupt subsequent to February 7, 1948; and in finding that no part of the assets of the bankrupt came into the actual or constructive possession of the said R. H. Dachner subsequent to the filing of the bankruptcy petition on Febru-

ary 7, 1948; and in failing to find that upon the reversal of the state court judgment on June 25, 1948, upon which judgment execution had previously been levied by the said R. H. Dachner on November 20, 1947, in the sum of \$26,266.81, that that said sum of money instantly became an asset of the bankrupt and the said R. H. Dachner held it as constructive trustee.

IX.

That the Referee erred in respect to said order in his Conclusion of Law No. 1, that the said Court was without jurisdiction to proceed.

X.

That the Referee erred in respect to said order in his Conclusions of Law Nos. 2 and 3, to the effect that the petition should be dismissed and that the order to show cause based thereupon should be discharged.

XI.

That the Referee erred in respect to said order by holding in effect that the state court had the power, during the bankruptcy proceeding, to diminish the assets of the bankrupt estate by determining therein that a compromise had been affected by certain officers of the debtors, when the action was one in personam and no appearance had been entered by the Trustee in Bankruptcy in the state court proceeding, nor had the Trustee been directed to enter an appearance, nor had there been any order directing that the claim might be litigated in the state court.

XII.

That the Referee erred in respect to said order in that the Referee failed to find as a matter of fact that the respondent had in his possession the sum of \$26,266.81, the assets of the bankrupt, and in failing to overrule the objections to summary jurisdiction.

Wherefore, your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy, and that the Referee promptly prepare and transmit to the Clerk thereof his certificate thereon, together with a statement of questions presented and transcript of the evidence taken at the hearing, together with all exhibits therein offered; that said order be reversed and that respondent be directed forthwith to surrender possession of the said \$26,266.81, together with interest on said sum to your petitioner and that your petitioner have such other and further relief as is just.

/s/ ALEX L. ARGUELLO,

Special Counsel for G. L. Thompson,

Trustee in Bankruptcy

ROYAL A. STEWART and

RICHARD W. HORTON,

Attorneys for G. L. Thompson, Trustee in Bankruptcy for Union Lead Mining and Smelter Company, Bankrupt

/s/ By ROYAL A. STEWART,

Of Counsel for Trustee

Duly Verified.

EXHIBIT A

SUMMARY OF HISTORICAL BACKGROUND,
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER RELATIVE TO TRUS-
TEE'S "TURN-OVER" PROCEEDING
HEREIN

This matter comes before this court, in the above entitled ancillary proceeding upon the issues (both factual and legal) raised by R. H. Dachner's answer and response to the petition of G. L. Thompson, as trustee in bankruptcy of Union Lead Mining and Smelter Company, and the order to show cause based upon said petition, by which said trustee seeks, in this ancillary, by a summary "turn-over" order, to get from the respondent, R. H. Dachner, the sum of \$26,266.81.

From the entire record now before the court in the above entitled ancillary proceeding in bankruptcy, including the petition at this time pending herein, the answer and response to said petition, the exhibits offered and received in evidence, when the issues raised by said petition and said answer and response came on for hearing herein, and a copy of the opinion of the Supreme Court of the State of Nevada in the case of Union Lead Mining and Smelter Company, a Nevada Corporation, Appellant, vs. R. H. Dachner, Doing Business Under the Firm Name and Style of "Pacific Machinery & Engineering Company, Respondent, No. 3578, de-

Exhibit A—(Continued)

cided December 18, 1951,* the historical background of the litigation, out of which the ancillary bankruptcy proceeding grows is as follows:

On June 16, 1947, R. H. Dachner (who was, and is, the respondent mentioned in said case in the Nevada Supreme Court and who, as aforesaid, is the respondent referred to in the particular matter now before this court, in the above entitled ancillary proceeding) secured a judgment, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in action No. 107708, Dept. No. 2, entitled, "R. H. Dachner, doing business under the firm name and style of Pacific Machinery & Engineering Company, Plaintiff, vs. Union Lead Mining and Smelter Company, a Nevada Corporation, Defendant," against the defendant mining and smelting company, in the sum of \$25,467.07, with interest thereon at the rate of 7% per annum from May 22, 1947, until paid, together with costs and disbursements in the sum of \$37.15.

During the month of July, 1947, Union Lead

*Although the aforesaid opinion had not been rendered and filed when the aforesaid hearing was held before this court, relative to the relief sought through the above entitled ancillary proceeding in bankruptcy, said opinion subsequently was supplied the court by counsel for the herein respondent and there has been no objection to the use thereof interposed by counsel on behalf of the herein interested trustee.

Exhibit A—(Continued)

Mining and Smelter Company took its appeal to the Nevada Supreme Court.

On August 27, 1947, said mining and smelting company entered into a contract with Imperial Lead Mines, Inc., for the sale, to the latter, of all said mining and smelter company's mining property and assets, by the terms of which said sale Union Lead Mining and Smelter Company was to receive forty per cent of the capital stock of Imperial Lead Mines, Inc., and a note of \$200,000. This agreement recognized that Union Lead Mining and Smelter Company had certain obligations which constituted liens against its properties and which were to be discharged by said mining and smelting company. If such liens were not so discharged, then they might be paid by Imperial Lead Mines, Inc., such payments to be credited against the sums due to said mining and smelting company. Among the obligations, so to be affected, was the Dachner judgment, then pending on appeal. There also were specified certain "production certificates" then outstanding, and being monetary obligations secured by trust deeds and also constituting charges against future production of the mines.

On November 20, 1947, Dachner successfully levied execution on the bank account of Union Lead Mining and Smelter Company in satisfaction of his aforesaid judgment, at that time still pending on appeal.

Certain of the production certificates of Union Lead Mining and Smelter Company were held by

Exhibit A—(Continued)

one Cowden and one Haskell, both of whom were stockholders of said mining and smelter company.

Imperial Lead Mines, Inc., entered into a contract relative to the asquisition of these certificates and stock holdings.

On November 21, 1947, Cowden and Haskell brought suit against Imperial Lead Mines, Inc., based upon the last mentioned contract, and, in said suit, prayed judgment in the sum of \$24,600., and an attachment was levied against the bank account of Imperial Lead Mines, Inc.

Although the last mentioned suit was brought against Imperial Lead Mines, Inc., and was based on the last mentioned contract, yet, under the terms of the earlier contract between Union Lead Mining and Smelter Company and Imperial Lead Mines, Inc., the retiring of the production certificates remained primarily the obligation of Union Lead Mining and Smelter Company.

After the commencement of the last mentioned action, conferences were held between representatives of Union Lead Mining and Smelter Company and Imperial Lead Mines, Inc., and it was decided that, rather than oppose the last referred-to suit, the certificates, held by Cowden and Haskell, would be purchased by Union Lead Mining and Smelter Company, on the most favorable terms that could be secured by negotiation. A cashier's check, in the sum of \$16,000., was procured by Union Lead Mining and Smelter Company, made payable to its president, Smoers. It then was decided that, in the

Exhibit A—(Continued)

negotiations with Cowden and Haskell, Union Lead Mining and Smelter Company would be represented by its vice-president, Blackwood. At the insistence of Ralph Morgali, the attorney for Imperial Lead Mines, Inc., a cashier's check then was exchanged for one payable to Blackwood, in order to assure and demonstrate Blackwood's authority to act for, and bind, Union Lead Mining and Smelter Company, in the negotiations and settlement.

On November 25, 1947, the settlement negotiations were held, in the office of Brown & Wells, Reno attorneys for Cowden and Haskell, said attorneys also being Dachner's attorneys. Those present at such settlement negotiations were Brown and Wells, Blackwood and Morgali. It there was agreed that the settlement would be for \$20,235, which was more than \$4,000 less than the aggregate sum sought by the action brought against Imperial Lead Mines, Inc., by Cowden and Haskell. In consideration of the settlement for the said sum of \$20,235, Blackwood, as the aforesaid representative of Union Lead Mining and Smelter Company, agreed that the Dachner action, against Union Lead Mining and Smelter Company, be deemed settled for the sum of \$26,266.81 received by Dachner as the result of the aforesaid levy of execution against the bank account of Union Lead Mining and Smelter Company, on November 20, 1947.

On November 26, 1947, Morgali returned to the office of Brown & Wells to carry out the terms of the settlement. He delivered the aforesaid Black-

Exhibit A—(Continued)

wood check in the sum of \$16,000, together with a second check for the balance in the sum of \$4,235 and, in return therefor, received the production certificates and the stock certificates. A telephone call was then made by Brown to W. E. Baldy who was the secretary of Union Lead Mining and Smelter Company, a member of its board of directors and one of its attorneys, informing said secretary, board member and attorney that the then pending appeal from the Dachner judgment was to be dismissed and Baldy thereupon, after checking with Blackwood, confirmed the fact that the settlement agreed upon, at the aforesaid negotiations, included the settlement of the Dachner action. O. M. Floe, a third member of the board of directors of Union Lead Mining and Smelter Company, also was consulted and approved the settlement and the dismissal of the appeal from the Dachner judgment which thereupon was dismissed by Baldy and Cowden and Haskell then dismissed their action against Imperial Lead Mining, Inc., with prejudice, and their attachment was released.

Union Lead Mining and Smelter Company had been represented by three attorneys, in the Dachner action, Baldy, William S. Boyle and Robert E. Berry, with Boyle acting as senior counsel. During the occurrences of the latter events hereinbefore set forth, Boyle had been seriously ill, had been hospitalized and, at the time of the happenings of the settlement events, was convalescing at his home. He had written Union Lead Mining and Smelter Com-

Exhibit A—(Continued)

pany asking to be relieved of his duties as its counsel. Before Baldy had taken any action, on behalf of Union Lead Mining and Smelter Company, with regard to the dismissal of said appeal from the judgment in favor of Dachner, Baldy had received a copy of the letter of Boyle asking, as aforesaid, to be relieved of his duties as counsel for Union Lead Mining and Smelter Company. The dismissal of said appeal, however, was directly contrary to the advice previously given by Boyle to Union Lead Mining and Smelter Company.

On learning of the aforesaid action taken, with regard the dismissal of the Dachner suit, Boyle summoned a majority of the officers and board members of Union Lead Mining and Smelter Company who thereupon, amongst themselves (with the aid of Baldy and Floe who reversed their former action) repudiated the last mentioned dismissal, repudiated Blackwood's action in including the settlement of the Dachner action as consideration for settlement of the Cowden-Haskell action against Imperial Lead Mines, Inc., and instructed Boyle to make a motion in the Supreme Court of Nevada for reinstatement of the appeal of Union Lead Mining and Smelter Company in the Dachner action.

No demand ever was made of Cowden, or Haskell, for the return of the money paid by Union Lead Mining and Smelter Company as the result of the aforesaid three-way settlement, nor was there any tender back of the production, or stock certificates.

Exhibit A—(Continued)

Boyle again became active as senior counsel for Union Lead Mining and Smelter Company and the above mentioned proposed motion for reinstatement was filed and duly made before the Nevada Supreme Court.

The sole question before the Supreme Court of Nevada (as specified in its opinion filed therein on December 18, 1951) was whether an authorized dismissal had in fact been accomplished.

The Nevada Supreme Court ordered reinstatement of said appeal, the reinstatement order, (according to the last mentioned opinion) reading:

“Without passing up the general proposition of law as to the authority of junior counsel to dismiss an appeal contrary to the wishes of senior counsel * * * we are of the opinion that the reinstatement of the appeal will result in less danger of injustice to the parties.”

According to the language of the aforesaid opinion, no reference whatsoever was made to the aforesaid negotiated settlement.

On February 7, 1948, Union Lead Mining and Smelter Company filed its voluntary petition in bankruptcy, in the United States District Court for the District of Nevada, the proceeding number being 743.

On February 9, 1948, the last mentioned court adjudged Union Lead Mining and Smelter Company a bankrupt.

On June 25, 1948, the Supreme Court of the State of Nevada, in the case of Union Lead Mining

Exhibit A—(Continued)

and Smelter Company, a Nevada Corporation, Appellant, vs. R. H. Dachner, etc., Respondent, No. 3499, reversed the judgment as the result of which said respondent (as plaintiff) had collected the aforesaid sum of \$26,266.81 and the case was “remanded to the district court for a new trial * * * and pursuant to such amendments in the pleadings as may be allowed in the discretion of the court * * *”

In October 25, 1948, Union Lead Mining and Smelter Company, the above named bankrupt, filed, in the District Court of the United States in and for the District of Nevada, in the primary bankruptcy proceeding, and under the same number (743) a petition for corporate reorganization.

(As to what was done with regard to the primary bankruptcy proceeding between the date upon which the original petition seeking an adjudication of Union Lead Mining and Smelter Company as a bankrupt, i.e., February 7, 1948, and October 25, 1948, the date upon which said petition for corporate reorganization was filed, in the court of original jurisdiction, the record before this ancillary court fails to speak, except to the extent that, on February 9, 1948, the primary bankruptcy proceeding was referred to a referee in bankruptcy of the District Court having primary jurisdiction, and that, subsequently, and after July 28, 1949, the referee in bankruptcy, to whom the primary bankruptcy proceeding had been referred having died, said primary proceeding was referred to the present

Exhibit A—(Continued)

duly appointed, qualified and acting referee in bankruptcy of said court of primary jurisdiction.)

On March 8, 1949, as the result of further proceedings held in the aforesaid Second Judicial District Court of Nevada, in the aforesaid action numbered 107708 wherein the above named Dachner was plaintiff and Union Lead Mining and Smelter Company was defendant, the following judgment was entered:

“Whereas, the Honorable A. J. Maestretti made and ordered to be served the following decision in the above entitled matter:

“Decision of the Court

“The Court: In this case the remittitur of the Supreme Court stated:

“‘It is evident from what we have said that the judgment must be reversed and the case remanded for a new trial, as the pleadings and findings cannot be modified in this Court to meet the situation. It is accordingly ordered that the judgment and the order denying appellant’s motion for new trial be, and the same hereby is, reversed and the case remanded to the District Court for a new trial in accordance with the views herein expressed, and pursuant to such amendments in the pleadings as may be allowed in the discretion of the Court and in accordance with any terms and conditions it may reasonably impose and whether made before such new trial or before submission of the cause in order to conform with the proofs. The appellant will recover its costs on this appeal.’

Exhibit A—(Continued)

“When the remittitur was received in this court and counsel appeared in court, the Court asked of counsel what if any amendments they wished to make to any of the pleadings; and none of counsel suggested any amendments, the plaintiff specifically standing upon his pleadings as they were in court.

“Consequently, the remittitur requirements for the allowance of amendments was voided by the action of counsel for the respective parties, who refused and still refuse to offer or make any amendments. This motion for dismissal of the action, therefore, was made by the party who prevailed at the initial trial; and inasmuch as neither of the litigants has suggested any amendments to their pleadings, it is not probable that a different result would be had in a new trial upon the same pleadings.

“The Court finds that it has jurisdiction to hear and determine the motion to dismiss.

“The Court further finds that the settlement was made between the parties as alleged in the motion and the affidavits in support thereof.

“The Court finds that the settlement was made without the presence of fraud or undue influence.

“The Court finds that the settlement was made between competent parties.

“The Court finds that the plaintiff herein and the Cowden-Haskell people did have legal reason to believe that Blackwood and Morgali and Baldy had the authority to enter into the agreement.

Exhibit A—(Continued)

“It is therefore ordered that the motion to dismiss is granted with prejudice.

“/s /A. J. Maestretti, District Judge

“Therefore in pursuance thereof,

“It is the judgment of the Court that the motion to dismiss the above-entitled action is granted with prejudice.

Done in Open Court this the 8th day of March, 1949.

“/s/ A. J. Maestretti, District Judge”

(The record before this ancillary court is silent as to what occurred in the original bankruptcy proceeding after the reorganization petition was filed on October 25, 1948, until January 8, 1951, when the referee in bankruptcy now, as then, acting in aid of and on behalf of, the bankruptcy court of original jurisdiction, caused notice to be given to the creditors of the above named bankrupt that because “no plan of reorganization had been submitted and approved within the time fixed by the Court, the Court upon the report of the Trustee* and upon notice and in pursuance of Section 236(1) of the Bankruptcy Act and other sections of said

* The record before this ancillary court does not disclose whether the trustee, originally mentioned, was a trustee appointed in the primary bankruptcy proceeding before the petition for reorganization was filed, or was a trustee originally appointed while the primary bankruptcy proceeding was under the corporate reorganization provisions of the Bankruptcy Act.

Exhibit A—(Continued)

Act did on the 4th day of January, 1951, order that bankruptcy proceedings be proceeded with and the petition for reorganization under Section 127 of the Act be dismissed * * *’)

On February 7, 1951, G. L. Thompson became the duly appointed, qualified and acting trustee of the estate in bankruptcy of the above named bankrupt.

(According to the certificates filed herein the record shows that no application has been made, either to the Judge of the court of primary bankruptcy jurisdiction, or to the referee in bankruptcy of such last mentioned court for any action to proceed in the state courts of Nevada.

On June 18, 1951, G. L. Thompson, as said last mentioned trustee in bankruptcy, filed in the above entitled court the petition for ancillary administration, and on the last mentioned date the above entitled matter was referred to the undersigned referee in bankruptcy for the purposes of hearing and determining the rights of the parties involved.

After setting forth certain jurisdictional matters which are of no concern of this court at this stage of the herein proceeding, the last mentioned petition contains, in substance, the following allegations:

That at the time the petition in bankruptcy was filed in the court of primary jurisdiction, i.e., on February 7, 1948, said R. H. Dachner had in his possession, or under his control \$26,266.81, belonging to the bankrupt estate, which said R. H. Dachner received from the bankrupt on November 20, 1947,

That, at the time of the filing of the aforesaid

Exhibit A—(Continued)

original petition in bankruptcy, said R. H. Dachner had no claim adverse to the last mentioned trustee, to said sum of \$26,266.81, and at most only had a colorable claim to said sum.

That said R. H. Dachner now (at the time of the filing of the aforesaid petition for ancillary administration in the above entitled court) has in his possession, or under his control the sum of \$26,266.81.

That said last mentioned trustee has made demand upon R. H. Dachner for the surrender and possession of said sum of \$26,266.81 and that said R. H. Dachner has failed and refused to comply with such demand.

That on November 20, 1947, R. H. Dachner obtained a lien upon said sum of \$26,266.81, belonging to the bankrupt estate.

That, on November 20, 1947, Union Lead Mining and Smelter Company, the bankrupt, was insolvent.

That R. H. Dachner now (at the time of the filing of the petition for ancillary administration, as aforesaid) has in his possession, or under his control, the sum of \$26,266.81, obtained by him, by reason of a lien hereinbefore and previously set forth, which lien was secured by the enforcement of an execution given on a judgment issuing out of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, which judgment was reversed by the Supreme Court of the State of Nevada, by a judgment entered in the last mentioned court on June 25, 1948.

That said R. H. Dachner obtained said sum of

Exhibit A—(Continued)

\$26,266.81 in fraud of the provisions of the Bankruptcy Act.

The prayer of said petition for ancillary administration contains, among other things, that said R. H. Dachner be directed forthwith to surrender possession of said sum of \$26,266.81, together with interest thereon, and that the last mentioned trustee have such other and further relief as is just.

In his answer and response to the last mentioned petition and the order to show cause based on said petition, R. H. Dachner avers, in substance, among other things:

That said petition fails to state a claim against respondent upon which relief can be granted.

That this court lacks jurisdiction of the subject matter of the action in that respondent's claim to the funds here involved is an adverse and valid claim, which claim thereby ousts the Bankruptcy Court of the summary jurisdiction which the petitioner here seeks to invoke to determine actual controversies over title to property not in the hands of the bankrupt.

That respondent, in his answer and response filed herein on July 20, 1951, denies, all and singular, as follows:

That, at the time of filing of the original petition in bankruptcy, R. H. Dachner had in his possession, or under his control, the sum of \$26,266.81, belonging to the bankrupt estate, which said R. H. Dachner received from the bankrupt on November 20, 1947;

Exhibit A—(Continued)

That, at the time of the filing of said original petition in bankruptcy, said R. H. Dachner had no claim adverse to said last mentioned trustee, to said sum of \$26,266.81, and at most only had a colorable claim to said sum;

That, on November 20, 1947, Union Lead Mining and Smelter Company, Bankrupt, was insolvent, and

That said R. H. Dachner obtained said sum of \$26,266.81 in fraud of the provisions of the Bankruptcy Act.

In the third defense to summary proceeding, R. H. Dachner, in said answer and response, admits that he secured said sum of \$26,266.81 by execution on a judgment of the District Court for the Second Judicial District of Nevada, and that said judgment was reversed and remanded to said trial court by the Supreme Court of Nevada.

In said answer and response, R. H. Dachner also set forth that said Nevada trial court, on the remand of the case, entered a judgment of dismissal on the motion of (R. H. Dachner) the plaintiff in the last mentioned action (the respondent herein) because the trial court found that said action had been fully compromised and settled and that neither party had any claim against the other, after the settlement. That said judgment of dismissal is now (on the date the answer and response was filed) on appeal to the Supreme Court of Nevada and has been set down for oral argument before said court on September 4, 1951;

Exhibit A—(Continued)

In his fourth defense to said Petition now before this ancillary court, R. H. Dachner denies that Union Lead Mining and Smelter Company was insolvent on November 20, 1947, or at any time prior, or subsequent thereto; and R. H. Dachner alleges that in any event he had no knowledge of the alleged insolvency of Union Lead Mining and Smelter Company, nor any reasonable cause to believe said corporation was insolvent, or respondent's (Dachner's) receipt of the sum obtained by execution would effect, or result in, a preference, but that, on the contrary, R. H. Dachner averred that on November 20, 1947, and for some time prior thereto, he knew that Union Lead Mining and Smelter Company had, on August 27, 1947, sold all its assets to Imperial Lead Mines, Incorporated, for the sum of \$275,000.00.

The question as to whether, or not, this ancillary court, in a summary proceeding, has jurisdiction so to proceed came before this court on July 26, 1951, and evidence was offered and received. At the conclusion of evidence taking, counsel for the respective parties directly interested were directed to file briefs and such briefs have been supplied.

Subsequent to the filing of the aforesaid briefs, the Supreme Court of Nevada, on December 18, 1951, as aforesaid, rendered its opinion and judgment on the appeal of Union Lead Mining and Smelter Company from the judgment rendered in the hereinbefore mentioned Dachner action by the District Court of the Second Judicial District of

Exhibit A—(Continued)

Nevada, in and for the County of Washoe, as the result of which said opinion and the judgment simultaneously rendered, the lower court judgment of dismissal was affirmed.

FINDINGS

Based upon the record before the court, the court finds that, at the time the original petition in bankruptcy was filed in the United States District Court for the District of Nevada, i.e., on February 7, 1948, R. H. Dachner did not have in his actual, or constructive, possession any property whatsoever belonging to, or owned by, Union Lead Mining and Smelter Company, nor did R. H. Dachner have under his control, in any manner whatsoever, any such property, nor any part of the assets, or such bankrupt, nor, at any time subsequent to the filing of said original petition in bankruptcy, on February 7, 1948, as aforesaid has any of such property, or any part of the assets of said bankrupt, come into the actual or constructive possession of R. H. Dachner, nor has any of such property, or any part of the assets, of said bankrupt, come under the control of R. H. Dachner, subsequent to the filing date of the last mentioned bankruptcy petition.

This court therefore, concludes, as matters of law:

1. That this court is without jurisdiction to proceed upon the aforesaid petition filed, by the aforesaid trustee, in the above entitled court;

Exhibit A—(Continued)

2. That the last mentioned petition should be dismissed, and

3. That the order to show cause based upon said petition should be discharged.

It Therefore, Hereby Is Ordered:

1. That the court is without jurisdiction to proceed upon the petition filed, by the aforesaid trustee, in the above entitled United States District Court for the Northern District of California;

2. That the last mentioned petition be, and said petition is Dismissed, and

3. That the order to show cause, based upon the last mentioned petition be, and said order to show cause is, Discharged.

Dated: March 12, 1952.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed March 12, 1952.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause.]

**CERTIFICATE AND REPORT OF REFEREE
RELATIVE TO REFEREE'S ORDER,
DATED MARCH 12, 1952**

To Honorable Michael J. Roche, United States District Judge for the Northern District of California:

On April 21, 1952, the above named trustee in bankruptcy caused to be filed in the above entitled matter, the following petition for review:

[Printer's Note: Petition for Review is set out at pages 15-19 of this printed Record.]

The original of the document in which is contained the order referred to in Paragraph I of the last mentioned petition, a copy of which is attached thereto, as "Exhibit A", is inserted herein and, in its entirety, reads:

[Printer's Note: Exhibit A is set out at pages 20-38 of this printed Record.]

The circumstances which ultimately gave rise to said petition for review, in brief, are as follows:

On June 18, 1951, the following verified petition for ancillary administration was filed in the above entitled court:

[Printer's Note: Petition for Ancillary Administration is set out at pages 3-7 of this printed Record.]

Thereafter, and also on June 18, 1951, the following "Rule To Show Cause", based upon the aforesaid petition for ancillary administration, was is-

sued by, and filed in, the office of the undersigned referee in bankruptcy:

[Printer's Note: Rule to Show Cause is set out at page 12 of this printed Record.]

Responsive to the aforesaid petition for ancillary administration and the aforesaid "Rule To Show Cause", the following answer was filed with the undersigned referee in bankruptcy, on July 20, 1951:

[Printer's Note: The Answer is set out at pages 13-15 of this printed Record.]

The issues, both legal and factual, as raised by said petition for ancillary administration, said "Rule To Show Cause" and the aforesaid answer, came on for hearing before the undersigned referee in bankruptcy, on July 26, 1951, Royal A. Stewart, Esq., of the firm of Messrs. Stewart & Horton, of Reno, Nevada, appearing on behalf of the aforesaid trustee in bankruptcy, together with Alex L. Arguello, Esq., of San Francisco, California, special counsel for said trustee, and C. W. Weinberger, Esq., representing the firm of Messrs. Heller, Ehrman, White & McAuliffe, appearing on behalf of the respondent R. H. Dachner.

At said hearing eight documents were introduced in evidence, six on behalf of said trustee, and two on behalf of said respondent. They, as hereinafter will appear herein are handed up herewith, as part of this certificate and report.

The matter then was submitted on briefs, and the briefs having been filed on behalf of the interested parties, and the undersigned referee in bankruptcy

having considered such briefs, in connection with the evidence presented made and filed the hereinbefore-set-forth order which is complained of in the aforesaid petition for review that now is placed before the District Court for hearing and consideration.

REFEREE'S NOTES

Because it may be helpful to the Judge called upon to deal with the aforesaid petition for review and the referee's certificate and report relative thereto, there is hereinafter incorporated into this certificate and report, the notes which were made by the undersigned referee in bankruptcy, in the course of the research deemed necessary in order to determine the questions under consideration. The copies of the aforesaid notes are as follows:

Note 1

"Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a non-bankruptcy court, to which the bankrupt is a party. *Pickens vs. Roy*, 187 U.S. 177; *Jones vs. Springer*, 226 U.S. 148; *Straton vs. New*, 283 U.S. 318."

Connell vs. Walker, 291 U.S. 1, 5; 54 S. Ct. 257, 258, 78 L. Ed. 613, 615.

"Upon the filing of a petition in bankruptcy the court is endowed with paramount authority under the Constitution over the bankrupt and his estate. Consequently it has power, pending the application for discharge, to restrain all suits against the debtor. The better order of procedure is, first, to direct the

attention of the court in which the suit is pending to the bankruptcy proceeding and to ask it to stay the suit until the application for discharge shall have been determined. A due sense of comity between state and federal courts dictates that the application should thus first be made to the state court. If proper relief is not granted there, the bankruptcy court, under the constitutional jurisdiction may enjoin the prosecution.”

In *re Innis* (C.C.A. 7) 140 F. (2d) 479, 480 [Certiorari denied, 322 U.S. 736, 64 S. Ct. 1048, 88 L. Ed. 1569].

It appears, from the facts and circumstances present herein, that the trustee in bankruptcy, with knowledge of the action pending, in the Nevada courts, wherein the bankrupt and Dachner, the respondent herein, were involved (even to the extent of availing himself of the use of the rulings therein, so long as such rulings seemingly worked to his advantage, as such trustee), stood silently aloof and did nothing whatsoever, either to see to it that he (as such trustee) became an active participant in such state court proceedings, or that the courts of Nevada, if possible, should be made to cease and desist their activities, in connection with the bankrupt and Dachner, until the primary bankruptcy court had dealt with the rights of the bankrupt and/or trustee and Dachner. In other words, it appears that the trustee had three causes of action:

(a) He, as such trustee, at least could have attempted to intervene in the proceedings in the Nevada courts;

(b) He, as such trustee, could have asked the Nevada courts for a stay of proceedings, to allow the primary bankruptcy court to deal with the Dachner situation, or

(c) He, as such trustee, if the Nevada courts had failed to grant him a stay, could have at least attempted to have the primary bankruptcy court enjoin the proceedings in the Nevada courts, with regard to the Dachner matter.

In taking the position which the record herein shows that he did take, it seems that the trustee's attitude in allowing the Nevada courts to proceed as they did proceed, so far as Dachner was involved, inferentially, at least, consented to such court's procedure and hence, in this ancillary proceeding, is confronted, inescapably, with one of the time-honored maxims of jurisprudence, "He who consents to an act is not wronged by it."

It also appears that there is another maxim of jurisprudence which, at this time, well can be applied to the trustee's conduct, and that is, "The law helps the vigilant, before those who sleep on their rights."

It is to be remembered, as was said, *In re Goetz*, 289 F. 118, 120, by Honorable Maurice T. Dooling (a one-time judge of the United States District Court for the Northern District of California, then sitting in the United States District Court for Arizona): "The trustee need not intervene; but, if he does not, he is bound by the judgment to the

same extent that any party acquiring an interest in the properly pending suit is bound.”

As the record stands, it appears that the bankrupt and Dachner have had their days in court. If the trustee herein, by the lack of timely action has failed to avail himself of the different opportunities afforded him so to participate as to present his side of the controversy, he cannot now be heard to complain in this ancillary bankruptcy matter, in this pending summary proceeding.

Note No. 2

“A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson vs. Magnolia Co.*, 309 U.S. 478, 481. If the property is not in the court’s possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated ‘in suits of the ordinary character, with the rights and remedies incident thereto.’ ”

Cline vs. Kaplan, 323 U.S. 97, 98, 99, 65 S. Ct. 155, 156, 89 L. Ed. 97, 99.

See also, *In re California Paving Co.* (D.C., N.D. Calif.) 95 F. Supp. 909, 911, [Affirmed (C.C.A. 9) 193 F. (2d) 647].

It appears, at this time, that there could be no clearer case of a bona fide claim to the money in controversy than that shown by the record herein, because—

(1) There is no question but Dachner originally

received the money as the result of an execution issued out of the Nevada court and that, regardless of the fact that subsequently the judgment, upon which said execution was based, was set aside on appeal, at all times since has held said money adversely to the bankrupt's estate, and (2) Dachner now holds such money, as his own, and not as any kind of trustee for the bankrupt's estate, by virtue of a settlement agreement which has the blessing of the Nevada Supreme Court (about which more is to be shown in a later note.)

Note No. 3

“* * * as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of the opinion that it is to be deemed of a substantial character when the claimant's contention ‘discloses a contested matter of right, involving some fair doubt and reasonable room for controversy’, Board of Education vs. Leary (C.C.A.) 236 F. 521, 527, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense.”

Harrison vs. Chamberlin, 271 U.S. 191, 194, 195, 46 S. Ct. 467, 469, 70 L. Ed. 897, 900.

See also, Bradley vs. St. Louis Terminal Warehouse Co. (C.C.A. 8) 189 F. (2d) 818, 824; Goggin vs. Consolidated Liquidating Corp. (C.C.A. 9) 190 F. (2d) 553, 554.

Note No. 4

What, in effect, the trustee herein is asking this court, acting in this ancillary proceeding in bankruptcy is to review, and, actually, in a measure, reverse the judgment of the Nevada Supreme Court. Such action cannot be taken by this court. "The United States District Court is of limited jurisdiction, 28 U.S.C.A. §371, and reviewing state court judgments is not of the powers granted."

Lyders vs. Petersen (C.C.A. 9) 88 F. (2d) 9, 10.

If it be contended that all the Nevada Supreme Court decided was that the dismissal order made in the lower Nevada Court be (as it was) affirmed, there is no escape from the answer that by such affirmance, the bankrupt and Dachner were placed in the same situation as they were at the time the settlement agreement among the bankrupt, Imperial Lead Mines, Inc., and Dachner, originally, was carried through, it being remembered that, according to the opinion announced by the Supreme Court of Nevada, in the second appeal, that court specifically pointed out that, as a part of said agreement (by which said Supreme Court specifically declared that the bankrupt benefited), the Dachner action against the bankrupt, in the Nevada courts, was settled for the sum secured by Dachner by the execution issued and levied in said last mentioned action, i.e., for the sum of \$25,467.07.

See last referred-to Supreme Court Opinion, in action numbered 3578, wherein, at pages 6 and 7 of the certified copy of said opinion in the record herein, it is said:

“It is clear that Union benefited from the settlement and retained the benefits thereof while purporting to repudiate the agreement in part. The settlement must, then, be taken to have been ratified in whole.”

See also, another statement from said opinion, pages 7 and 8 thereof:

“True, Dachner might have moved this court for dismissal of the appeal upon the ground of settlement and thus specifically directed the attention of the court to the moot status of the matter. However, if the fact of settlement was not presented to the court as a basis for action, neither was it concealed from the court. Thus it can hardly be said that Dachner had abandoned or waived his contention in relation thereto and his continuing with the appeal upon the merits cannot be said to have operated to nullify the settlement.”

If under circumstances different from those present herein, it might be argued that, granting that because of the settlement agreement (in the absence of the primary bankruptcy proceeding) Dachner, by resting upon the terms of the settlement agreement favorable to him, placed himself in a successfully unassailable position, yet because of the commencement of said primary proceeding within four months subsequent to the receipt of the aforesaid sum paid him by reason of the aforesaid execution, there was a voidable preferential payment to him. Such an argument, if made herein, would be without legal merit in this summary proceeding, first, because such a contention, over an ob-

jection to jurisdiction could not successfully be maintained in a summary proceeding and, secondly, because the preferential payment point was specifically, and properly, withdrawn from consideration herein, as is shown on page 8 of the Reporter's Transcript of Proceedings held on July 26, 1951.

Record Herein and Papers Handed Up
Herewith

The record, so far as this summary proceeding is concerned, consists of the Petition for Ancillary Administration and the order of reference of the ancillary proceeding, to the undersigned referee in bankruptcy (the original of said petition and the original of said order being on file in the office of the clerk of the above entitled court) and also the following papers which are handed up herewith as a part of this certificate and report:

1. Rule To Show Cause;
2. Answer of Respondent, etc.;
3. Points and Authorities in Support of Trustee's Petition for Turnover Order;
4. Reporter's Transcript of Proceedings of July 26, 1951;
5. Points and Authorities in Support of Trustee's Petition for Turnover Order;
6. Brief of Respondent R. H. Dachner;
7. Reply to Respondent's Points and Authorities on Petition for Turnover Order;
8. Envelope containing Exhibits (offered and received at hearing of the aforesaid petition and rule to show cause, together with certified copy of opin-

ion of Nevada Supreme Court, in action numbered 3578, filed in said court on December 18, 1951).

Dated: September 24th, 1952.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed September 24, 1952.

In the United States District Court for the Northern District of California, Southern Division

In Bankruptcy—No. 39,899

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, Bankrupt.

G. L. THOMPSON, as Trustee in Bankruptcy of
Union Lead Mining and Smelter Company,
Bankrupt, Petitioner,

vs.

R. H. DACHNER, Respondent.

ORDER CONFIRMING ORDER OF REFEREE

It Is Ordered that the order of the Referee in Bankruptcy entered in the above-entitled cause on March 12, 1952, be and the same hereby is Confirmed.

Dated: January 23rd, 1953.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge

[Endorsed]: Filed January 23, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that G. L. Thompson, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt, Petitioner hereinabove named, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the Order of the District Court entered on the 23rd day of January, 1953, the Honorable Michael J. Roche presiding, wherein the Order of the Referee in Bankruptcy entered in the above entitled cause on the 12th day of March, was confirmed.

/s/ ALEX L. ARGUELLO,

Special Counsel for G. L. Thompson,
Trustee in Bankruptcy

Acknowledgment of Service attached.

[Endorsed]: Filed February 18, 1953.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS FOR APPEAL

Pursuant to Rule 19 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the Appellant sets forth below the points upon which he intends to rely on his appeal:

Point One: That the Honorable Michael J. Roche erred in confirming the Order of the Referee in

Bankruptcy entered on March 12th, 1952, in the following particular:

Point Two: That the Referee erred in failing to find, upon the uncontroverted evidence, that no appearance was ever made by the Trustee in any of the state court actions and that there was no order ever issued out of the Federal Court directing such appearance and that there was no order entered in either the bankruptcy or the reorganization proceedings allowing the Dachner claim to be litigated in the state court (Trustee's Exhibits 4, 5 and 6).

Point Three: That the Referee erred in respect to said order, in that said Referee found that said R. H. Dachner did not have under his control any part of the assets of the bankrupt subsequent to February 7, 1948; and in finding that no part of the assets of the bankrupt came into the actual or constructive possession of the said R. H. Dachner subsequent to the filing of the bankruptcy petition on February 7, 1948; and in failing to find that upon the reversal of the state court judgment on June 25, 1948, upon which judgment execution had previously been levied by the said R. H. Dachner on November 20, 1947, in the sum of \$26,266.81, that that said sum of money instantly became an asset of the bankrupt and the said R. H. Dachner held it as constructive trustee.

Point Four: That the Referee erred in respect to said order in his Conclusion of Law No. 1, that the said Court was without jurisdiction to proceed.

Point Five: That the Referee erred in respect to said order in his Conclusions of Law Nos. 2 and

3, to the effect that the petition should be dismissed and that the order to show cause based thereupon should be discharged.

Point Six: That the Referee erred in respect to said order by holding in effect that the state court had the power, during the bankruptcy proceeding, to diminish the assets of the bankrupt estate by determining therein that a compromise had been effected by certain officers of the debtor, when the action was one in personam and no appearance had been entered by the Trustee in Bankruptcy in the state court proceeding, nor had the Trustee been directed to enter an appearance, nor had there been any order directing that the claim might be litigated in the state court.

Point Seven: That the Referee erred in respect to said order in that the Referee failed to find as a matter of fact that the respondent had in his possession the sum of \$26,266.81, the assets of the bankrupt, and in failing to overrule the objections to summary jurisdiction.

/s/ ALEX L. ARGUELLO,
Special Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed March 11, 1953.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
FOR APPEAL

Appellant designates the following portions of the record as material to his appeal:

1. Order authorizing trustee to employ counsel filed in United States District Court for the District of Nevada, June 11, 1951.

2. Trustee's Petition for authority to employ Special Counsel.

3. Petition for Ancillary Administration filed June 18, 1951.

4. Rule to Show Cause filed June 18, 1951.

5. Order United States District Court for Northern District of California, Southern Division, signed by Honorable Edward P. Murphy filed June 18, 1951.

6. Answer to Petition for Ancillary Administration by Respondent.

7. Summary of Historical Background, Findings of Fact, Conclusions of Law and Order Relative to Trustee's "Turn-over" Proceeding Herein signed by Referee Burton J. Wyman, filed March 12, 1952.

8. Petition to Review Referee's Order filed April 21, 1952.

9. Certificate and Report of Referee Relative to Referee's Order, dated March 12, 1952. Signed by Referee in Bankruptcy, Burton J. Wyman filed September 24, 1952.

10. Order confirming Order of Referee. Signed

by the Honorable Michael J. Roche filed January 23, 1953.

11. Notice of Appeal filed February 18, 1953.

Exhibits

1. Trustee's Exhibit No. 1—Appointment of Frank W. Ingram, as Referee.

2. Trustee's Exhibit No. 2—Referee's Certified Record of Proceedings.

3. Trustee's Exhibit No. 3—Copy of Judgment, Dachner vs. Union Lead Mining and Smelter Company, No. 107708.

4. Trustee's Exhibit No. 4—Certificate of Clerk of the Second District Court, State of Nevada.

5. Trustee's Exhibit No. 5—Certificate of Referee in Bankruptcy in Nevada.

6. Trustee's Exhibit No. 6—Certificate of Clerk of United States District Court of Nevada.

/s/ ALEX L. ARGUELLO,

Special Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed March 11, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below,

are the originals filed in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Petition for ancillary administration, filed June 18, 1951.

Order referring matter to Referee, etc., filed June 18, 1951.

Rule to show cause.

Answer of Respondent to petition for ancillary administration.

Petition to review Referee's order, with copy of Referee's order attached.

Certificate and Report of Referee relative to Referee's order, dated March 12, 1952.

Order confirming order of Referee, filed January 23, 1953.

Notice of Appeal.

Appellant's statement of points for appeal.

Appellant's designation of record on appeal.

Trustee's Exhibits 1 to 6.

Respondent's Exhibits 1 and 2.

Opinion of Supreme Court of the State of Nevada.

Certificate of Clerk, Supreme Court, dated July 19, 1951.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 17th day of March, 1953.

[Seal]

C. W. CALBREATH,
Clerk

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF RECORD FOR APPEAL

Respondent designates the following portions of the record as material to his appeal:

1. Respondent's exhibits.
2. Reporter's transcript of proceedings of July 26, 1951.
3. Referee's notes are to be included with Certificate and Report of Referee Relative to Referee's Order, dated March 12, 1952, signed by Referee in Bankruptcy, Burton J. Wyman, filed September 24, 1952.

/s/ CASPER W. WEINBERGER,
/s/ EUGENE S. CLIFFORD,
/s/ HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Respondent

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLE- MENTAL RECORD

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in the above-entitled matter, and that

they constitute a part of the record on appeal herein as designated by the attorney for the appellee:

Respondent's designation of record on appeal.

Reporter's transcript of July 26, 1951.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 18th day of March, 1953.

[Seal]

C. W. CALBREATH, Clerk

In the Southern Division of the United States District Court for the Northern District of California.

No. 39,899

In the Matter of UNION LEAD MINING &
SMELTER COMPANY, Bankrupt.

ANCILLERY PROCEEDINGS

Thursday, July 26, 1951

Before: Honorable Burton J. Wyman, Referee in Bankruptcy.

Appearances: For the Trustee: Royal A. Stewart, Esq., representing Messrs. Stewart & Morton, Reno, Nevada; and Alex L. Arguello, Esq., San Francisco, Special Counsel for Trustee. For the Respondent: C. W. Weinberger, Esq., representing Messrs. Heller, Ehrman, White & McAuliffe. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Weinberger: We represent the Respondent to the Order to Show Cause today and have the opening statement. It is a complicated proceeding. If you would bear with me, I would like to state just what we expect to prove through witnesses and the introduction of documentary testimony.

The Referee: Is there any objection at this time, Counsel?

Mr. Stewart: I thought possibly the shoe might be on the other foot. I thought the trustee should make the opening statement. While he is required to show cause here, I think the trustee is required to make a *prima facie* case before we do anything else.

The Referee: That is, unless you are going to admit——

Mr. Weinberger: We are not going to admit anything.

The Referee: Let Counsel for the trustee make a statement.

Mr. Stewart: May it please the Court, in this matter the trustee's proof will show that R. H. Dachner, the Respondent herein, obtained a judgment against the bankrupt prior to the bankruptcy, on June 16, 1947, and levied execution and received on his levy of execution \$26,266.81 on March 20, 1947.

The Referee: When was the petition filed, Counsel?

Mr. Stewart: In the District Court of Nevada.

The Referee: When?

Mr. Stewart: The petition in bankruptcy was

filed on February 7, 1948, and the adjudication in bankruptcy was two days [2] later.

The judgment upon which the execution was levied was appealed to the Supreme Court of the State of Nevada and during the bankruptcy proceeding and on June 25, 1948, the reversal of that judgment became final in the State Court by the issuing of a remittitur down to the District Court. In other words, reversing the judgment upon which the execution was levied.

I think this entire matter is purely a question of law. Our contentions in the matter are simply these: that the action in the State Court was an in personam action for money, judgment was obtained which was reversed. That immediately upon the reversal and the final remittitur coming down from the Supreme Court to the State Court during the bankruptcy proceeding, that Mr. Dachner, the respondent herein, became a constructive trustee then and there, holding in his hands the twenty-six thousand-odd dollars, which then and there was an asset of the bankrupt estate.

Our proof also will show that the trustee in bankruptcy—incidentally, there was an attempted reorganization in the bankruptcy. There was a bankruptcy petition in reorganization and bankruptcy again in the matter, but the proceeding has been commenced since the first petition in February of 1948—that the respondent then became a constructive trustee and that the State Court thereafter had no power whatsoever to divest the trustee of

these funds of which he was in constructive possession at that time. [3]

That is our case. We will have the authorities to support it. And our case will consist of introducing various certified copies of various records to show the procedure that took place in support of it. I am not going to argue the law at this time. I merely want to state the position of the trustee. The records also show, of course, that the District Court has jurisdiction and referred the matter to this Court. I think those matters are pretty well admitted in the Answer filed, so I won't go too greatly into it, but the meat of the question of law involved, I think, is whether or not the State Court had authority to divest the trustee of the funds, which we contend came into his possession under Section 75 of the Bankruptcy Act, because the State Court, in the other suits, the case will show, the State Court went ahead with the proceedings.

The Referee: Did the State Court have notice of all these bankruptcy proceedings?

Mr. Stewart: Apparently not. I have a certified copy of the record to show that neither the trustee in bankruptcy nor the trustee in reorganization ever entered an appearance in the State Court. No order was entered ordering the trustee to do anything, nor any petition filed or order made permitting the State Court to go ahead with the legislation.

The Referee: Not legislation.

Mr. Stewart: The litigation; I am sorry. In other words, the bankrupt apparently went right ahead just as though [4] the petition in bankruptcy

had not been filed and the bankruptcy trustee did nothing. There was no action taken at all. Our contention is that an in personam action such as this one, once the trustee becomes vested with this money—we say he did become vested with this money immediately the appeal was reversed—the State Court has no power during the bankruptcy, to divest him of possession. And the Respondent here, with due deference, in substance, their contention is that the Respondent did have possession. We contend, as you can see by the argument, our contention is the respondent had physical possession, yes, which he still has, but ever since the reversal from the Supreme Court, he held and still holds the money as trustee, constructive trustee for the bankruptcy estate.

The Referee: Do I understand that this writ was levied after the filing of the petition in bankruptcy?

Mr. Stewart: No, Your Honor. It was levied before and the reversal came during the bankruptcy.

The Referee: Make your statement at this time.

Mr. Weinberger: Yes, I prefer to do that, because one of our defenses is that we have moved to dismiss, in effect, and at the same time we don't wish anything we have done to be construed as a general appearance.

One of our contentions is that this is a real, adverse, not colorable claim to the property. Consequently, there is no summary jurisdiction, only plenary jurisdiction in the Court.

I would like to explain the statement of Counsel

as [5] to the proceedings in the State Court. Everything he has said is entirely true. So far as the reversal, which remanded, it was remanded for further proceedings in the trial court and further proceedings were held in the trial court and the trial court some six months or nine months after the remittitur came down in March, 1949, having heard evidence, taken testimony, entered judgment of dismissal and found as a fact that there was no longer any controversy and the matter had been settled, compromised, and paid by competent parties. That was the District Judge, Judge Maestretti, in the trial court in Nevada. Now, that judgment of dismissal and the findings of fact are now being received in the Nevada Supreme Court for a second appeal and that appeal is set down for argument in September, 1951. The matter is by no means finished, and there will be another decision by the Nevada Supreme Court and if the trial court is affirmed as, naturally, I believe it will be, then there will be nothing in the nature of the State Court's divesting the trustee of the funds; it will be an affirmed decision to the effect that the dismissal is proper and the matter has been compromised, settled, and paid by competent parties. Therefore, there is no question of a pending appeal or no question of a State court reversal, taking the funds away from the respondent.

I would like to go back just a moment to additional facts in the case. I think it would be best before your Honor. The petition in bankruptcy was filed, as has been noted, approximately thirteen days

short of four months after the execution [6] was levied. The execution was levied on November 20, 1947, and the debtor's petition in bankruptcy was filed by the President of Union Lead Mining & Smelter Company on February 7, I believe, or 8, of 1948. Now, I have been informed yesterday, unexpectedly to me, and I feel compelled in the interest of my client to say, that the gentleman who filed that petition, Mr. Somers, has been indicted by the Grand Jury in Nevada for filing a false petition. He has been tried once and is to be tried again, and the statements in the debtor's petition, we think will demonstrate conclusively when measured against the facts, that there was no insolvency at that time and there could be no insolvency when the execution was levied. Furthermore, Mr. Dachner, the respondent, had no reason to believe there was any insolvency or that the payment to him of that amount would result in a preference.

The Referee: As I understand, they are not raising the question of preference. You are saying that Mr. Dachner was the agent at the date of the reversal. Is that correct, Counsel?

Mr. Stewart: We are saying he became, by operation of law, a constructive trustee holding the funds, yes.

Mr. Weinberger: That could be true if there were a final reversal, but with the matter still pending——

The Referee: I was just pointing out that you mentioned a preference.

Mr. Weinberger: The petition speaks of a preference. [7] The petition, so far as can be told, develops the theory of either a preference or moneys secured by lien under a legal proceeding and therefore liable to be set aside. Not knowing the position, I thought it best to argue there was not a preference.

Mr. Stewart: We might save time there. At this time we are not claiming, even though there is an allegation in the petition, we are not claiming preference. We are relying simply on the constructive trustee theory and will offer no proof to show insolvency at the time the transfer was made. As a matter of fact, we believe that if we went on that theory, it would probably be a plenary and not a summary suit.

Mr. Weinberger: Of course, we are somewhat surprised at this statement, because we had anticipated from the petition that the entire argument was to be based on preference.

The Referee: That is eliminated.

Mr. Weinberger: I think that makes my task easier. I don't think there is the slightest possibility of a resulting trustee when the matter is still pending. I have, when we come to the authorities now or later——

The Referee: Let them put in their evidence, put in the evidence they are going to and whatever you can stipulate to. You might stipulate and save a lot of time probably.

Mr. Weinberger: I don't think there will be too much dispute about the facts. I did want to bring

out before I rested this opening statement that the proceeding, I think, should have [8] the background of the case, even though there are briefs; it is not to be argued. It is an extremely complicated matter we have felt.

The Union Lead Mining & Smelter Co. was sold to the Imperial Lead Mines, Inc., there was an agreement to sell all the assets to the Imperial Lead Mines, Inc., in August of 1947, approximately four months, or three months before the levy of the execution. The Imperial Lead Mines, Inc., promised, or the consideration was \$75,000.00 cash, a promissory note for \$200,000.00, secured by a deed of trust, and six hundred thousand shares of common stock of Imperial Lead Mines, Inc., all of which was to be paid to Union Lead Mining & Smelter Co., and in fact, was paid.

Mr. Stewart: Now, just a moment.

Mr. Weinberger: Well, the note was given, the cash paid, and the stock transferred. All the consideration promised was paid. I agree that the note has not been paid out; and the deed of trust was given. None of these assets, incidentally, were listed in the Union Lead's bankruptcy petition in February.

The Referee: Was it a voluntary petition?

Mr. Weinberger: It was a petition by the debtor, yes, sir, and which, obviously, was the reason for the criminal proceedings later. Another element of the sales agreement was that the Imperial Lead would assume the indebtedness and would retire the production certificates that were outstanding of

Union Lead Mining and Smelter Co., which constituted the great bulk of the [9] debts listed in the inventory and the debtor's petition filed short of the four months period. They were retired by cash payments and issuing new certificates. By the time of the filing of the petition, they were all retired and the assets far exceeded the liabilities as the subsequent petition shows. That was filed in October of 1948.

The Referee: Has there been any proceeding to set aside the bankruptcy proceeding itself?

Mr. Weinberger: No, the petition in reorganization was specifically stated to have been designed to supercede the debtor's petition filed in February, 1948. It was stated that a plan of reorganization would be prepared and presented to the Court forthwith; and some years passed and in February, 1951, a new notice of a first meeting of creditors was sent out in which it was stated that no plan had ever been presented; therefore, they would proceed with the original bankruptcy petition. I cannot, however, believe that the matter will be dismissed in view of the facts that have developed since, that I certainly want here today. But, that is the background of the matter, which on the actual case involved a judgment that was rendered. The facts are substantially as stated. Suit was brought by Mr. Dachner against Union Lead Mining & Smelter Co. based on the obtaining of services on a quantum meruit; there was a judgment and on appeal was reversed by the Supreme Court and remitted to the trial court with permission to amend

if the trial court thought proper. And mention was made of [10] Imperial Lead Mines, Inc., for the reason of showing, your Honor, what the actual facts of this settlement, compromise, and payment to Mr. Dachner were. Imperial Lead Mines, Inc., in purchasing, naturally, wanted all outstanding litigation cleared up. There were two suits, Mr. Dachner's on appeal and a suit involving Cowden and Haskell brought by the same counsel representing Mr. Dachner against both Imperial Lead Mines, Inc., and Union Lead Mining & Smelter Co., and the facts of that were that Imperial Lead Mines, Inc., had promised to take up and retire all production certificates. For some reason, \$90,000.00 held by Cowden and Haskell had not been taken up. Consequently, they sued both companies to have them taken up. The matter was pending in November of 1947, when Imperial Mines, Inc., wished to go ahead with the sale and have the litigation cleared up. There was a compromise worked out between the gentlemen then representing Union Lead Mining & Smelter Co. Their former attorney had signed a specific withdrawal as counsel in all matters in which the company was concerned. And its new counsel, counsel for Imperial Lead Mines, Inc., and counsel for Mr. Dachner, and also for Cowden and Haskell agreed a settlement would be arranged. Some \$16,000.00 was paid to Cowden and Haskell; Mr. Dachner was to be allowed to retain the money obtained on the satisfaction of his judgment and the appeal to be dismissed, and it was dismissed and the consideration passed. The

whole matter was compromised and settled. Then, some two weeks later the former counsel for Union Lead Mining & Smelter Co. moved in [11] the Supreme Court to reinstate the appeal; they did reinstate it and, as has been said, reversed it, sent it back to the trial court, and the trial court took testimony as to all this matter and found as a fact that the matter had been settled, compromised, and approved by competent parties on each side, nothing left in dispute, and granted Mr. Dachner's motion for dismissal; and it is that judgment that is now on appeal in the Nevada State Supreme Court, now set for hearing November 4, this year. For that reason, we don't feel there can be a constructive trustee asset or a final determination, since we think more than likely, or at least likely, that the second judgment will be affirmed and clearly, no constructive trustee is holding anything; simply, that Mr. Dachner is entitled to keep the money paid to him.

The Referee: Who is representing the appellee in the second suit, the one on appeal now?

Mr. Weinberger: The same counsel who has represented him all the way through, Ernest S. Brown. Mr. Dachner is the appellee. He won in the trial court both times.

The Referee: Who is representing the appellant?

Mr. Weinberger: In that suit? I don't know. Is it Mr. Boyle?

Mr. Stewart: No, Mr. Boyle is dead. The directors of Union Lead Mining & Smelter Co., apparently employed someone who has no connection

with the bankruptcy proceeding, who has been acting as counsel for Union Lead Mining & Smelter Co. We [12] don't know anything about it.

The Referee: Do you know, Counsel representing the trustee, why didn't the trustee give notice to the State Court of the pendency of the bankruptcy proceeding?

Mr. Stewart: Why didn't he get notice?

The Referee: Why didn't he give notice?

Mr. Stewart: I cannot answer that, Judge, for the reason that I came into the case rather late. There have been two trustees and the present trustee, upon the stay of the order in the reorganization proceeding, directing that the original bankruptcy be proceeded with, which I think was made sometime in February of this year, so that he came into the picture rather late on it, apparently that is the reason Mr. Dachner never petitioned the Court either to have the trustee made a party or for an order allowing him to proceed in the State Court. I don't know that either.

Mr. Weinberger: Counsel, continuing the supposing, seems to add to the weight that the trustee, taking over all the affairs of the bankrupt, has nothing to do with the prosecution of the appeal; that seems to raise a new question as to the competency of someone else to prosecute the appeal during the time the affairs of the bankrupt were in the hands of the trustee. It raises the question as to the authority of the appeal now being prosecuted. If that be true, I take it the judgment would be affirmed by the Court.

The Referee: Of course, I can understand that the trustee might not want to appear in that suit.

Mr. Weinberger: He might not feel it has **any** merit.

The Referee: Not necessarily that. He might not want to submit to the jurisdiction of the State Court.

Mr. Stewart: That is correct. Our position is that the decision of the Supreme Court will decide nothing. That is our position. We have authority **to the effect** that the decision of the State Court, if the Supreme Court makes a decision, will not affect the trustee's right to the money nor decide that Mr. Dachner even has a claim against the estate. That is our position.

The Referee: Gentlemen, can't you sit down and stipulate to the facts here?

Mr. Weinberger: I don't think there is any trouble about the facts, your Honor.

Mr. Stewart: All my evidence consists of documents with written authorities. I think he has the same thing. I don't think it will take me more than a couple of minutes.

Mr. Weinberger: I have a great deal of matter showing no preference, no fraud, no reasonable knowledge.

The Referee: I am going to say to both you gentlemen, I want all the facts. Then, I will give you a chance to brief it, so that you can summarize the law points involved.

Mr. Stewart: May I proceed now?

The Referee: Yes.

Mr. Stewart: The first document I am going

to offer [14] is the appointment of Frank W. Ingram as referee. You have admitted that, for the record?

Mr. Weinberger: Yes.

The Referee: Trustee's Exhibit No. 1.

(The document referred to was admitted in evidence as Trustee's Exhibit No. 1.)

[See page 96 of this printed Record.]

Mr. Stewart: The next document I am offering is a certified copy, certified by the Referee in Bankruptcy, of the debtor's petition with schedules attached.

Mr. Weinberger: This is the first one?

Mr. Stewart: Yes.

The Referee: Everything goes back to the date of the filing, anyway.

Mr. Weinberger: Of the first petition. I was confused by these first pages, which we do not have.

The Referee: Trustee's Exhibit No. 2.

(The Referee's Certified Record of Proceedings was received in evidence as Trustee's Exhibit No. 2.)

[See page 97 of this printed Record.]

Mr. Stewart: The next document I am offering in evidence is a photostatic copy of the judgment in the case of Dachner vs. Union Lead Mining & Smelter Co., No. 107708, Department No. 2, in the Second Division Judicial District Court of the State of Nevada in and for the County of Washoe; and of the execution, levy and remittitur from the Supreme Court of the State of Nevada, together with a memorandum of cases.

The Referee: Trustee's 3, and there will be a [15] notation on the back of this.

(The documents referred to were admitted in evidence as Trustee's Exhibit No. 3.)

[See page 112 of this printed Record.]

Mr. Stewart: The next document I offer in evidence is an exemplified certificate of the clerk, by the Clerk of the Second District Court of the State of Nevada, to the effect that no trustee in bankruptcy or trustee in reorganization ever entered an appearance or became a party to the State Court action.

Mr. Weinberger: Which number is this? This is the number of the first suit?

Mr. Stewart: Yes, the original suit.

The Referee: Trustee's No. 4.

(The Certificate of the Clerk of the Court referred to was admitted in evidence as Trustee's Exhibit No. 4.)

[See page 123 of this printed Record.]

Mr. Stewart: The next document is a Certificate of the Referee in Bankruptcy for the District of Nevada, to the effect that he has examined the files and finds that the respondent herein nor anyone on his behalf ever petitioned for authority to liquidate the claim in the State Court proceeding; that no order was ever made authorizing the respondent herein to liquidate his claim in the State Court proceeding.

Mr. Weinberger: I object to this, your Honor,

on the ground that it is incompetent, irrelevant and immaterial. The fact that execution was levied thirteen days prior to even this petition being filed, there was no duty whatever and would [16] have no bearing on the matter of what was done after the petition in bankruptcy was filed, when the execution had been completed.

Mr. Stewart: Our position is that the respondent was not relying on the first judgment; that is reversed. He is relying on the second judgment under the Supreme Court and that judgment was entered during the bankruptcy, so it becomes material.

The Referee: You mean, whether they appeared in the first suit?

Mr. Stewart: Whether they appeared at any time in the action.

The Referee: You are relying on the action taken by the Supreme Court in the first suit?

Mr. Stewart: Yes.

Mr. Weinberger: They are relying on the second.

The Referee: The objection is overruled. Trustee's No. 5.

(The Certificate of the Referee in Bankruptcy referred to was admitted in evidence as Trustee's Exhibit No. 5.)

[See page 126 of this printed Record.]

Mr. Stewart: The next document is the Certificate of the Clerk of the United States District Court of Nevada, practically to the same effect as the previous Certificate, in view of the fact that

these proceedings were partly reorganization and partly bankruptcy.

Mr. Weinberger: We will make the same objection to [17] that, your Honor, and the further objection that on this it says: "No order was ever made and entered authorizing Mr. Dachner to litigate his claim." He had fully litigated his claim prior to the bankruptcy. The proceedings afterward were remanded. I simply want to point out there was nothing left in controversy.

Mr. Stewart: I cannot stipulate to that. They are relying on the second judgment.

Mr. Weinberger: We are relying on the execution under the first judgment and the compromise that followed by five days the levy of the execution.

The Referee: Isn't that a matter of defense?

Mr. Weinberger: It is a matter of defense, but I don't think this in any manner refers to the proof of the case. I think the same objection goes to both documents.

The Referee: Objection may be overruled. Trustee's No. 6.

(The Certificate of the Clerk referred to was admitted in evidence as Trustee's Exhibit No. 6.)

[See page 127 of this printed Record.]

Mr. Stewart: I believe that is the Trustee's case.
(Trustee rests.)

Mr. Weinberger: If your Honor please, the first document we would like to introduce is the Certificate of Ned Turner, the Clerk of the Supreme

Court of Nevada, to the effect that an appeal is now pending on this case and set for oral [18] argument for Tuesday, September 4, 1951.

The Referee: That is the first?

Mr. Weinberger: The first appeal, disposed of, remanded to the trial court. This is the appeal from that.

The Referee: I will ask you: Are you going to put in the judgment of the District Court?

Mr. Weinberger: Yes, sir, the first judgment already has gone in. I propose to put the second judgment in now.

The Referee: I was wondering about the order. Wouldn't the judgment come before?

Mr. Weinberger: That, unquestionably, is right.

The Referee: It just keeps the exhibits in order.

Mr. Weinberger: What I can do, if your Honor would prefer, we have here a full certificate of all the records in connection with the evidence taken in this matter and——

The Referee: The first and the second?

Mr. Weinberger: The first and the second. This is not the whole record of the appeal in the first case, in a sense. It does not have the pleadings. What this document is, all certified by the Clerk, it consists, first, of an exhibit to the effect that relates to the settlement of the first case. That is, a certified check drawn by Mr. Somers, the President of the company, settling the offer made that I referred to; then, it has the order dismissing the appeal on stipulation following the settlement; it has the motion to reinstate and an order granting

the reinstatement of the appeal, [19] and it has the judgment; following then, the judgment of the trial court in the second case, and, finally, the certificate that it is pending. I don't know why it is made in this order, but the reason I want it is for the judgment in the second case. It has been bound all together; it came in that form. While it has some things that are relevant and some that are not, I would rather not separate it, because the certificate goes to the whole document.

Mr. Stewart: Without examining these documents, I assume the Clerk's Certificate covers everything in that.

Mr. Weinberger: That is my understanding. It was all in the same group.

Mr. Stewart: In order to be consistent with my theory, I have to make the objection that all the documents offered are irrelevant for the reason that they took place subsequent to the adjudication in bankruptcy and the State Court had no power to bind the trustee.

Mr. Weinberger: As to that, your Honor, your Honor directly pointed out that Counsel is relying on the judgment of the Supreme Court giving him the fund. From there on they were Nevada creditors.

Mr. Stewart: We do and we do not. Does that also contain the remittitur from the Supreme Court?

Mr. Weinberger: I don't know that it does. You have put it in.

Mr. Stewart: The judgment does not show the

remittitur [20] issued and it started with the remittitur. My objection goes to this upon that ground.

The Referee: Now, let's see. So far as you are concerned, from your point of view, you have shown the exact basis on which you stand; that is, that the remittitur has been handed down?

Mr. Stewart: Yes.

The Referee: This is in defense: That as part of the remittitur, the lower court was authorized to have a further hearing?

Mr. Weinberger: Yes. As a matter of fact, in the second judgment now on appeal, the trial court recites the remittitur as giving him power to hear the case again and then makes a judgment based on the remittitur and that judgment is on appeal.

The Referee: I am going to let Counsel make the objection, but I am going to overrule it.

Mr. Stewart: I understand that you have to, but to get the point before you.

The Referee: What is the objection, Counsel?

Mr. Stewart: The objection is that the documents offered are irrelevant and immaterial, for the reason that it all took place after the trustee became vested with the money and that the State Court had no power to alter the right of the trustee of the money.

Mr. Weinberger: The question of whether the trustee [21] was vested with the money is dependent on the final action of the State Court, not an intermediate action of the State Court. That has been our position from the start.

The Referee: The objection is overruled. This

will be Respondent's Exhibit No. 1, including all the exhibits.

[See page 128 of this printed Record.]

Mr. Weinberger: Thank you. I did not notice. Did your exhibit include the notice which recites the first meeting?

Mr. Stewart: No.

Mr. Weinberger: I would like that in. I have an extra copy of it, not certified, rather than cluttering the records of the Court with the whole petition. As a matter of fact, that is the corporate reorganization petition.

Mr. Stewart: Have you offered this?

Mr. Weinberger: No. I now offer as the next in order, the Referee's Certified record of the Proceeding, which includes the notice which recites the meeting of creditors, showing that no plan of reorganization was ever submitted under Chapter X, the debtor's petition for corporate reorganization filed in October, 1948; and included in this group of exhibits is also the Deed of Trust which was part security for the Imperial Lead Mines, Inc., purchase of Union Lead Mining & Smelter Co.; and at the back of it is another copy of the original petition. I don't like to add to the burden of the Court, but they are all bound together and certified together.

Mr. Stewart: Counsel for the trustee objects to the admission of the Deed of Trust and Petition for Reorganization [22] on the grounds that they are irrelevant in this proceeding. It occurs to me

that probably they had originally ought to have been offered in order to combat a claim of insolvency at the time of this transfer and since that is being waived, it occurs to me they are not admissible.

Mr. Weinberger: That certainly was the reason originally in obtaining it, but I think it is necessary for a complete record to demonstrate, despite Counsel's stipulation that there was no insolvency, so there is no possibility of claiming a preference.

The Referee: Isn't that behind us?

Mr. Weinberger: However, I say, if your Honor please, I want the record absolutely clear on it.

The Referee: If that is the only point——

Mr. Weinberger: That is not the only point, but this petition for corporate reorganization that was filed in October recites certain facts about the judgment and raises clearly and shows the trustee's knowledge of the remand to the District Court; and it shows that the proceedings were still open in the District Court of Nevada and the case was by no means finished. This is to defeat the claim that there was any possibility of a constructive trustee, because it demonstrates and bolsters the evidence already in to show what the remand was and shows that the trustee had full knowledge of the proceedings in the State Court. In fact, they had not terminated when the Nevada Supreme Court issued the first order. [23]

Mr. Stewart: May I inquire what trustee you are referring to? Trustee under the trust deed or the trustee in bankruptcy?

Mr. Weinberger: The trustee in bankruptcy. I take it the trustee has full knowledge of everything in the bankruptcy file. This petition for corporate reorganization is in the same bankruptcy file. The deed of trust, admittedly, is irrelevant, but it is bound with a clip. But I do want that. It recites the notice of the first meeting.

Mr. Stewart: I stand on the objection.

The Referee: Can't you separate it and put in anything that is relevant?

Mr. Weinberger: I will be glad to do that. It destroys the effect of the certificate to some extent.

The Referee: How about that, Counsel?

Mr. Stewart: No, we are going to object to the certificate calling for two things. Obviously, the party attesting to the record, certified to the correctness of them. That is all we are entitled to.

Mr. Weinberger: I will separate the deed of trust and ask that the remaining be admitted.

Mr. Stewart: My objection also went to the petition in reorganization.

The Referee: What about that? Is that offered in evidence?

Mr. Weinberger: Oh, yes, very definitely, because [24] that demonstrates the knowledge of all familiar with the file, including the trustee, that the remand from the Nevada Court did not conclude the proceeding. It indicates full knowledge on the trustee's part and full ability to appear and make any objection he wished in the proceedings. This is dated October, 1948.

The Referee: That became part of the record in the bankruptcy?

Mr. Weinberger: Yes, sir. This is designed on its face to supersede the bankruptcy.

Mr. Stewart: Our point is that the trustee in bankruptcy is not required to enter an appearance in any State Court proceeding unless the Bankruptcy Court orders him to do so; and regardless of the fact that he may have had knowledge that a State Court proceeding was going on, the State Court cannot compel him to come in.

The Referee: No, but might not the question arise, even though he does not have to appear if he does not want to, might not the question arise that he might be negligent in not doing it?

Mr. Weinberger: Not applying to the Court for an order.

The Referee: I cannot quite follow you, Counsel. I cannot go as far as you do. I can see your point. I can see that under certain circumstances probably you are correct in the statement of the law. [25]

Mr. Stewart: I think your contention would be correct if the State Court action were in rem, because, in an action in rem, the State Court takes possession of certain property and would have a right to bind the trustee in bankruptcy, certainly, if he had not taken part in the action. But, in an in personam action, we could cite cases where the trustee was allowed to stay out entirely and the State Court has no effect at all.

The Referee: Of course, doesn't that depend on the state of facts?

Mr. Stewart: Not in an in personam action, an in personam action commenced prior to bankruptcy and not finally disposed of until after bankruptcy; it does not bind the trustee in bankruptcy unless one of three things happens: He is ordered to defend; enters an appearance; or an order is entered allowing the matter to be litigated in the State Court. That can be done, too, none of which was done in this case.

Mr. Weinberger: We think it is exactly the same as if an executor of a decedent's estate knew of a suit pending against the deceased before his death, knew the matter was on appeal and took no further action. We think clearly, so far as the Court ordering the trustee to proceed, that has to be done on application of the trustee himself. So, knowledge, we think, in the trustee of the pendency of this proceeding and fact that the remand was for further proceedings and this was filed October, 1948, and further proceedings were held in January and February, 1949, we think it is all relevant as disputing the [26] idea of a claim of a constructive trust.

The Referee: The objection is overruled. That is Respondent's Exhibit No. 2.

(The group of documents referred to was marked Respondent's Exhibit No. 2.)

[See page 130 of this printed Record.]

Mr. Weinberger: If your Honor please, this copy has not been exemplified; I did not plan to use it. Of course, the argument would be made entirely

on the proof that this is the Notice of Motion of Mr. Dachner's counsel to dismiss the action after it came back from the Nevada Supreme Court the first time. It sets forth the grounds for his motion for dismissal and the facts surrounding the settlement and compromise of the case, which led Judge Mastretti to decide that the matter had been compromised.

The Referee: Did the trustee get notice of this?

Mr. Weinberger: So far as appears from the bankruptcy file in the debtor's petition for reorganization.

Mr. Stewart: The trustee did not. The trustee was not served with the notice.

Mr. Weinberger: No, he was not served with the notice, but the Union Lead Mining & Smelter Co. was and the attorneys of record were, and the petition shows that the trustee must have had knowledge that this matter was forwarded to the trial court for further decision.

The Referee: You say must have; upon what do you base that? [27]

Mr. Weinberger: Because, it was in the bankruptcy file, the petition for corporate reorganization shows that the matter was remanded to the Nevada trial court. I have no evidence that this notice of motion was served on the trustee; I don't know that it was; but the fact of further proceedings having been held in the case are apparent from the order of the Nevada Supreme Court and from the recitals in the corporate reorganization petition.

The Referee: Aren't you then bound by just the

records that appear in the bankruptcy matter, if you have no evidence of service on the trustee?

Mr. Weinberger: I am afraid I don't quite understand you.

The Referee: Well, you say that in Exhibit Respondent's No. 2, it shows that the trustee must have had knowledge.

Mr. Weinberger: Not of the motion to dismiss, but of the proceeding itself.

The Referee: Yes.

Mr. Weinberger: Yes.

The Referee: Can you follow that up without having served it on the trustee and it not being a part of the record in the bankruptcy proceeding?

Mr. Weinberger: What I had in mind in introducing this exhibit is to show additional facts of the settlement of the controversy; to show that the trial court in Nevada in ruling to the effect that the matter was settled, compromised [28] and fully paid demonstrates another ground for the retention of these funds. They were not taken only by judgment and execution; they were taken that way originally, and allowed to be retained by Mr. Dachner as the result of the compromise and payment settlement of the case, which the Court, in effect, found had taken place.

The Referee: Yes.

Mr. Stewart: I think I can solve the question here. The document he is offering is not admissible under any circumstances, because it is not authenticated.

Mr. Weinberger: No, it is not.

The Referee: He stated that.

Mr. Stewart: Aside from the fact whether the petition for corporate reorganization or any other matter shows that the trustee had notice, the trustee has notice now, but the question of time is important, too. Naturally, the trustee at the time this reorganization petition was filed by the bankrupt in the bankruptcy proceedings unquestionably was served with a copy of it. But, by that time all matters in the State Courts had gone by the board and it was too late for the trustee to do anything if he was of a mind to do so. So, the mere fact that they want to show that the bankrupt recites in the corporate reorganization petition certain things had taken place before, of course, can impute knowledge to the trustee, but the question is when he got the knowledge, and this is something that occurred prior thereto. [29]

Mr. Weinberger: Not prior. The petition was filed October, 1948, and this motion, I see, is September, 1948. I thought it was later. But the fact is that knowledge of the case itself came from the original bankruptcy petition, and knowledge of the pendency of the case, it seems to me, by the trustee, did follow all the way through.

The Referee: Isn't that all you can prove, then, if you have not made service on the trustee?

Mr. Weinberger: We don't intend to bind the trustee so far as this is concerned. What we intend to show is that Mr. Dachner has two bases for retaining the money: One, he took it on the execution of a judgment, which had not been finally settled;

two, he took it under a settlement agreement and compromise, which is completely aside from the execution, under which he is entitled to retain it, unless it was a preference, which has been waived.

The Referee: Then, if you don't intend to bind the trustee, it is not competent.

Mr. Weinberger: Here, your Honor, is documentary evidence that tends to show the second basis for the retention of the funds. If all he did rely on was the judgment, possibly he should not. In other words the execution was on November 20; on November 25 all the parties knew, as this document shows.

The Referee: You say, all the parties knew.

Mr. Weinberger: The representatives. This is long before the bankruptcy, thirteen days short of the four months [30] period.

Mr. Stewart: I think the answer to that is that you cannot impeach the judgment of the Supreme Court. As of some time in 1948, almost a year subsequent to this claimed compromise, our contention is, that the judgment of the Supreme Court, insofar as it disposed of the issues at that time; in other words, if anything existed it is *res adjudicata* by reason of the judgment of the Supreme Court up to the time the remittitur came down.

Mr. Weinberger: Of course, your Honor, the Nevada Supreme Court only had the merits; the record was prepared before the settlement; the case was on appeal. The appeal was dismissed as part of the settlement. I am trying to show that on November 20th, Mr. Dachner took the funds by exe-

cution. On November 25, the parties—then the trustee was not a party, because it was not in bankruptcy—all the parties knew and agreed that Mr. Dachner should be allowed to retain the money taken on execution; Mr. Cowden would take a less amount; the appeal would be dismissed in Mr. Dachner's suit and everything would be wiped out, releases given, and everything agreed on was done. A few weeks later, another attorney who contended he really represented the company, came into the case; the Nevada Supreme Court reinstated the appeal; when it went back the second time, the Court found this settlement was made by competent parties representing the company at that time. That is on appeal now. And that gives another ground for the [31] retention of the funds.

The Referee: What is this document?

Mr. Weinberger: Notice of Motion that there would be an action filed by Mr. Dachner's counsel in Nevada after the remand came back. In other words, the remand to the trial court, the trial court regained jurisdiction; Mr. Dachner's counsel moved to dismiss on the ground that it was fully settled. The Court took the motion under advisement and decided for Mr. Dachner. This gives your Honor additional background as to why the judgment was given.

The Referee: Probably it would be very enlightening, but, I don't see how you can get it in if it is not part of this record, and the trustee did not get notice of it.

Mr. Weinberger: Your Honor, simply this: There

are other methods by which people are permitted to claim and retain funds paid by a person who is adjudged bankrupt within four months. If no question of preference is involved at all, no facts on which to base a preference, and I give your Honor \$5,000.00 and within three and one-half months I go into bankruptcy, your Honor can retain that if there is no preference.

The Referee: The preference is out.

Mr. Weinberger: The preference is out, so, the payment by settlement, not by execution but by settlement, may be retained by Mr. Dachner, and this document is competent to show the payment by settlement as opposed to the payment by judgment.

Mr. Stewart: I disagree. The document is not competent [32] to prove anything. The only thing it is is a notice of motion and an affidavit by Mr. Dachner's attorney. A judgment in Nevada under the Nevada law, a judgment between two parties is *res adjudicata* not only as to the matters litigated, but whatever could be litigated, during the pendency of an appeal. If the case becomes moot during the pendency of the appeal, the party is obligated to move the Supreme Court to dismiss the appeal. If he don't, the judgment gets down where it will stand on the record. Aside from that, this document is not relevant to anything; it does not purport to be the action of the Court. It is merely a pleading filed with the State Court. We have already in evidence the action the State Court took in connection with this matter. That is relevant, not the argument used.

Mr. Weinberger: Anything that bears on the judgment of the trial court now on appeal is relevant, even if the judgment should be reversed. Nevertheless, the payment was made as the result of the compromise, not the execution. Both this and the next document, the brief of Mr. Dachner's counsel in support of the motion, explains why the trial court reached its decision and bears on that point and is relevant, showing the ultimate reasons.

The Referee: I will ask you, Counsel, are you actually relying on the fact that it is not authenticated?

Mr. Stewart: Yes, I am relying on that. I haven't the slightest idea or any way of verifying that it was filed [33] anywhere. Also I am relying on the objection that it is entirely irrelevant. In other words, if we introduce these two documents in the proceeding here, we will have a record that will take up your Honor's file, the Washoe County files, the debtor's appeal in this case, as well as the Supreme Court records; the answering brief comes into evidence. We will have on file a group of matters that won't help in deciding the case at all.

Mr. Weinberger: It is not authenticated. I would like, if possible, to have an opportunity to have it authenticated in Nevada.

The Referee: I am not going to deny you that, but I still cannot see where it is relevant under the conditions, when you admit the trustee was not served with notice and you are trying to hold the trustee. You have been permitted to put in your

exhibit holding him as these documents do, because they are part of the bankruptcy proceeding.

Mr. Weinberger: We are not trying to hold him; we are trying to hold onto the funds.

The Referee: I understand that, but the only way you can hold onto the funds is to have the Court hold by competent evidence that the acts of the trustee, either by commission or omission, placed him in the position where your client is entitled to hold onto the funds.

Mr. Weinberger: The preference is out, your Honor. The only basis for taking the funds back would be a constructive [34] trustee situation; that would be if the judgment is finally reversed. But, we have something much more than a judgment and execution; we have an agreement which the trial court found was made by competent parties.

The Referee: That is on appeal.

Mr. Weinberger: Yes, that is on appeal.

The Referee: Therefore, this Court cannot say that is a final judgment.

Mr. Weinberger: No, but evidence as to either basis for obtaining the funds is certainly relevant in a proceeding to reclaim funds by the trustee.

Mr. Stewart: Our point is, if the Court please, that the very matter he seeks to raise here is before the Court in connection with the judgment. In other words, the judgment is on appeal at the present time. In other words, if the State Court had authority to proceed, the judgment of the State Court in the second proceedings which has not yet been reversed, is determinative of the matter. In other words, if the State Court had the right to

bind the trustee, the judgment which has already been introduced in evidence, absolutely, unqualifiedly gives that right if the State Court had the right to interfere with the debtor's estate and take it away. The proceedings that went on in getting the second judgment are not relevant here and have no bearing.

The Referee: I think you are correct. In other words, what it would be, the result would be that this Court [35] would be retrying the case again after a judgment.

Mr. Stewart: I agree. I have agreed right from the very beginning that regardless of whether the State Court in this second case was right or wrong. I am not urging that here. If it had the power to do it, the trustee is going to lose in this action. In other words, if the State Court had the power to divest the trustee of funds after he was in the constructive possession of it, it does not make any difference in this proceeding whether he was right or wrong if it had the power to do such a thing.

Mr. Weinberger: For the record, do I correctly understand that your objection goes both to the legal authentication and the relevancy?

Mr. Stewart: That is correct. I have heard mention of the fact made that it was not final many times, but our position is that the first judgment lost all force and effect; that proceeding was terminated when the Supreme Court said the judgment was reversed. The fact that it remanded it and allowed a new trial does not affect the finality of

that first judgment. When the remittitur came down, that judgment was gone, wiped off the books entirely.

Mr. Weinberger: If your Honor please, we have Mr. Dachner here. I had planned to examine him on the question of the insolvency, his good faith in the matter and all questions of actually their insolvency. None of that is relevant.

The Referee: No. [36]

Mr. Weinberger: I wondered if your Honor cares to hear any testimony as to the state of the case, as to the compromise, as to the payment by settlement of the case, outside of the other basis?

The Referee: On Counsel's statement, he is practically relying on one theory.

Mr. Stewart: That is right.

The Referee: That the State of Nevada, after the filing of the bankruptcy, through any of its courts, had no jurisdiction to act.

Mr. Stewart: Jurisdiction to deprive the trustee of funds.

Mr. Weinberger: During the pendency of a proceeding of which the trustee has knowledge?

The Referee: I am not saying whether he is right or wrong. That is his theory. Therefore, there is no necessity for putting in evidence along that line.

Mr. Weinberger: The only thing, I don't like to labor the point, aside from any proceeding in the Nevada Courts whatever, going back to the original example: When I pay you \$5,000.00 and go into

bankruptcy and no preference is alleged of any kind and cannot be, though it happens within the four months, you may retain that; and that is the other basis of our arguing that Mr. Dachner has the right to retain these funds. Consequently, I think everything that bears on the point that these funds, admittedly, were first taken under [37] execution, but he was allowed to retain them, long before the bankruptcy on account of the settlement; I think anything that bears on that bears out our second ground.

The Referee: Again then, you are asking me to try that Nevada case.

Mr. Weinberger: No, sir, we are not.

The Referee: Yes, you are.

Mr. Weinberger: We are asking your Honor only to hold that there is no basis for returning the funds to the trustee since they have been paid under the circumstances, in order to get the circumstances before your Honor.

The Referee: Doesn't it amount to this: If I follow, in the end, the theory advanced by counsel for the trustee, and he is right, that condition could not enter into it anyway?

Mr. Stewart: That is correct.

Mr. Weinberger: No, sir, because that theory is based on the lack of jurisdiction of the State Courts, and our second ground for the retention of these funds had nothing to do with any judgment or any order of any court.

Mr. Stewart: Just a minute. The second judg-

ment is based on the compromise. Is that correct?

The Referee: It is not in yet. If he is correct, then the payment would not enter into it. If he is not correct in his theory, then you don't have to worry about it.

Mr. Weinberger: We are not worried about it. I simply want to cover every possible avenue in the matter, but [38] I do think it is a very clear case for the retention of the funds on the ground that they were paid as a compromise of a claim without reference to a judgment. If the second judgment is reversed, I still think it is a valid reason for the retention of these funds, having been paid under the compromise, although admittedly within the four months.

Mr. Stewart: If it was made by the trustee in bankruptcy; if the trustee in bankruptcy received authority from the Court to compromise, there might be an argument on that point.

Mr. Weinberger: We do want to insist, and present again, the matter we presented in the issue; that is, we have raised the factual point on all these matters presented.

The Referee: Did you follow the federal procedure?

Mr. Weinberger: Yes, sir. We moved to dismiss in a formal motion; proved definitely that it was purely an adverse claim and there is no summary jurisdiction.

The Referee: I assure you of this: I will take up the factual matters first. If, after the hearing

of the factual question, I come to the conclusion that other evidence should be offered, I will give both sides an opportunity.

Mr. Weinberger: Then, you don't wish to hear from Mr. Dachner as to the circumstances?

The Referee: Not at this time. I am not precluding you from putting him on later after I have dealt with the factual question. [39]

Mr. Weinberger: That is entirely satisfactory, so we submit it on that basis.

The Referee: How many days do you want to brief it?

Mr. Stewart: We, on behalf of the trustee, will file the opening brief to make our position clear. I think we can file the opening brief in fifteen days.

Mr. Weinberger: I am going to be out of town practically all of August.

The Referee: Well, lawyers are very optimistic when they are in court as to how soon they can file. Generally, they don't get them in. Suppose I give you twenty, twenty and ten? When are you coming back?

Mr. Weinberger: About the 30th of August, your Honor. Can we have thirty, thirty and ten?

The Referee: Yes. The question of jurisdiction. You can brief it in its entirety.

Mr. Weinberger: That is, whether there is summary jurisdiction.

Mr. Stewart: I might say to the Court that I think the question of jurisdiction disposes of the entire matter.

The Referee: I do, too.

Mr. Weinberger: That is what we had in mind in our first and second defenses, your Honor.

The Referee: Yes.

(Submitted 30-30-10)

[Endorsed]: Filed April 4, 1952. [40]

TRUSTEE'S EXHIBIT No. 1

United States District Court for the
District of Nevada

In the Matter of the Appointment of Frank W.
Ingram, Referee in Bankruptcy

ORDER

The office of part-time Referee for the District of Nevada having become vacant by reason of the death of Referee Gray Mashburn May 29th, 1949, and this Court now having been advised by the Administrative Office of the United States Courts that the Judicial Conference has authorized filling the referee's position in this District and has changed the regular place of office of the referee from Carson City to Reno, Nevada,

It Is Hereby Ordered, pursuant to the aforesaid authorization of the Judicial Conference, that Frank W. Ingram, Esq., of Reno, Washoe County, Nevada, be, and he hereby is, appointed part-time Referee in Bankruptcy for the District of Nevada for the period of six (6) years from and after the date of this order, upon his taking and subscribing the oath

Trustee's Exhibit No. 1—(Continued)
of office and filing a good and sufficient bond in the
sum of Two Thousand Five Hundred (\$2,500.00)
Dollars.

Dated this 28th day of July, 1949.

ROGER T. FOLEY,
United States District Judge

A true copy from the records. Attest:

[Seal] AMOS P. DICKEY, Clerk
/s/ By DAN MURPHY, Deputy

[Endorsed]: Filed July 30, 1949.

TRUSTEE'S EXHIBIT No. 2

In the District Court of the United States
for the District of Nevada

In Bankruptcy—No. 743

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, A Nevada Corpora-
tion, Bankrupt.

REFeree'S CERTIFIED RECORD OF
PROCEEDINGS

Debtor's Petition in Bankruptcy with schedules
attached filed February 1, 1948.

I, Frank W. Ingram, one of the Referees in
Bankruptcy in and for said District do hereby

Trustee's Exhibit No. 2—(Continued)
certify the following to be the true and correct
Referee's Record of Proceeding in the above en-
titled matter as referring to the above petition and
schedules mentioned and as photostated in the office
of the County Recorder of Washoe County, Nevada.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

DEBTOR'S PETITION

To the Honorable Roger Foley, Judge of the Dis-
trict Court of the United States of Nevada,
District of Nevada:

The Petition of the Union Lead Mining and
Smelter Company by and through its President,
John H. Somers, the said Union Lead Mining and
Smelter Company, a Corporation, residing at the
office of Warren E. Baldy, Attorney, Carson City,
County of Ormsby, State of Nevada, by occupation
the President of the Union Lead Mining and
Smelter Company, a Nevada Corporation, in the
business of mining, respectfully represents:

1. Your petitioner, the Union Lead Mining and
Smelter Company, a Corporation, has had its prin-
cipal place of business and has resided at Steam-
boat, Nevada, within the above judicial district, for
a longer portion of the six months immediately pre-
ceding the filing of this petition than in any other
judicial district.

2. Your petitioner owes debts and is willing to

Trustee's Exhibit No. 2—(Continued)

surrender all the Corporation's property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all debts, and, so far as it is possible to ascertain, the names and places of residence of creditors, and such further Statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore, your petitioner prays that it may be adjudged by the Court to be a bankrupt within the purview of said Act.

/s/ JOHN H. SOMERS,

Petitioner, President of the Union Lead Mining
and Smelter Company, a Nevada Corporation.

/s/ WILLIAM S. BOYLE,

Attorney

State of Nevada,
County of Washoe—ss.

I, John H. Somers, President of the Union Lead
Mining and Smelter Company, by resolution

adopted by a majority of the Directors of said Corporation, the petitioner named in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ JOHN H. SOMERS,
Petitioner, by Resolution adopted by a majority of
the Directors of the Corporation

Subscribed and sworn to before me this 5th day
of February, A. D. 1948.

[Seal] /s/ WILLIAM S. BOYLE,
Notary Public, Washoe County, Nev.

Schedule A—Statement of All Debts of Bankrupt

Schedule A-1

Statement of all creditors to whom priority is secured by the act

Claims Which Have Priority	Amount Due or Claimed
(a) Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each, earned within three months before filing the petition.	
Warren E. Baldy—Attorney for Company.....	\$10,000.00
William S. Boyle—Attorney for Company.....	10,000.00
P. H. McCarthy and F. Nason O'Hara, Balboa Building, San Francisco, California.....	5,000.00
Robert E. Berry, Virginia City, Nevada.....	1,000.00
John H. Somers—wages at \$500.00 a month for 5 years	30,000.00
(b) Taxes due and owing to:	
(1) The United States	None
(3) State of Nevada	None
All taxes are paid as far as we know to date.	

Trustee's Exhibit No. 2—(Continued)

Claims Which Have Priority	Amount Due or Claimed
(c) (1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority.	
None that we know of.....	None
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of Nevada, accrued within three months before filing the petition, for actual use and occupancy.	
None	None
Total.....	\$50,000.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule A-2

Creditors Holding Securities

(N.B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

	Amount Due or Claimed
The following Certificates must be paid from 15% of Net Profit from mine, if any Profit is had, therefore it is speculative.	
Frank Haskell—Sharon, Conn.—Paid by preference.....	\$90,000.00
Alma R. Cowden—Reno, Nev., Clay Peters Bldg.....	15,000.00
Dorothy Cowden Borrell—Seattle, Wn.....	15,000.00
Helen D. Cowden, Reno, Nev., Clay Peters Bldg.....	20,000.00
Annetta B. Roffe—2499 Grand Ave., New York City, N.Y.	5,000.00
Harry D. Cowden—Reno, Nev., Clay Peters Bldg.....	40,000.00

Trustee's Exhibit No. 2—(Continued)

	Amount Due or Claimed
O. M. Floe—539-10th St., Richmond, Calif. Paid \$2,000....	47,500.00
Elio Pagni—Steamboat, Nev.	1,500.00
William S. Boyle—Reno, Nev.....	5,000.00
W. K. McMillan—711 Post St., S. F., Calif.....	21,500.00
Erna Somers—Steamboat, Nev. Stock.....	50,000.00
Newton W. Craig—Box 22, Steamboat, Nev.....	6,500.00
Adele Ferguson—630 Mason St., S. F., Calif.....	5,000.00
Chas. D. Reynolds—729 Jones St., S. F., Calif.....	500.00
Claire E. Weber—630 Mason St., S. F., Calif.....	6,000.00
Verdon Garner—926 Masonic Ave., Albany	2,000.00
Gorden O. Garner—1219 Nelson St., Berkeley, Calif.....	2,000.00
John H. Somers—Steamboat, Nev. Stock.....	84,000.00
Betty Walker—Carson City, Nev.....	100.00
Warren E. Baldy—Carson City, Nev.....	12,000.00
Florence E. Baldy—Carson City, Nev.....	11,000.00
D. C. Randall & Norene Randell—Carson City.....	1,000.00
Luke Edwards—539-10th St., Richmond, Calif.....	3,000.00
Donald A. Davis—539-10th St., Richmond, Calif.....	1,500.00
Clift Garner	1,000.00
Garner	500.00
Joseph W. Johnson—Deeth, Nev.	2,200.00
Chester O. Woolsey—Medical Dental Building, San Francisco, Calif.	1,300.00
Anna Fleming—Steamboat, Nev.	1,000.00
Art Langan—Reno, Nev., 110 Rosa Circle, Westfield Village	1,000.00
E. H. Newdeck—3119 Carly Way, Sacramento, Calif.....	1,500.00
George Jenison—Box 10, Steamboat, Nev.....	2,000.00
Bert Donald Blackwood—P.O. Box 394, Lafayette, Calif... Transferred from H. D. Cowden, 9,000 shares Transferred from J. H. Somers, 7,000 shares Transferred from Dorothy C. Borrell, 8,000, 2,500 shares	26,500.00
John H. Somers—Steamboat, Nev.	21,600.00
Doris I. Blackwood—P.O. Box 394, Lafayette, Calif..... Transferred from Dorothy Cowden, 2,000 shares Transferred from H. D. Cowden, 13,000 shares	15,000.00
E. H. Bath—Carson City, Nev.....	1,300.00

Trustee's Exhibit No. 2—(Continued)

	Amount Due or Claimed
Bert Donald Blackwood, 2,500 shares.....	24,500.00
Transferred from Helen D. Cowden, 15,000, 5,000 shares	
Transferred from Alma R. Cowden, 2,000 shares	
Bert Donald Blackwood, 8,000 shares	22,500.00
Transferred from Annetta B. Foffe, 3,000 shares	
Transferred from Harry Cowden, 2,000 shares	
Transferred from Alma Cowden, 5,000 shares	
Transferred from Annetta B. Roffe, 2,000 shares	
Transferred from Harry Cowden, 2,500 shares	
R. H. Dachner—461 Market St., S. F., Calif.....	1,300.00
Transferred from C. O. Woolsey, 1,300 shares	
Cecil W. Hess—1242 Hawthorne St., Alameda, Calif.....	1,000.00
Lee J. Paschich, 535 Sutter St., S. F., California.....	500.00
Transferred from John H. Somers, 500 shares	
Dr. Lloyd H. Garrison—315 Sutter St., S. F., Calif.....	5,800.00
Transferred from H. D. Cowden, 5,800 shares	
John H. Somers— 41 \$1,000.00 Certificates.....	41,000.00
John H. Somers—87 \$500.00 Certificates	43,500.00
John H. Somers, 120 \$100.00 Certificates.....	12,000.00
Total.....	\$672,100.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule A-3

Creditors Whose Claims are Unsecured

(N.B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

	Amount Due or Claimed
O. M. Floe—loan to Union Lead Mining and Smelter Com- pany	\$ 8,000.00
Fourth Street Tool Shop	125.00

Trustee's Exhibit No. 2—(Continued)

	Amount Due or Claimed
Warren E. Baldy	10,000.00
William S. Boyle	10,000.00
P. H. McCarthy and F. Nason O'Hara.....	5,000.00
Robert E. Berry—Virginia City, Nev.....	1,000.00
That on Nov. 19th, 1946, R. H. Dachner in Dept. 2, Case No. 107708, in an action entitled "R. H. Dachner, doing business under the firm name and style of "Pacific Ma- chinery & Engineering Co.,—Plaintiff, vs. Union Lead Mining & Smelter Co., a Nevada Corporation,—Defend- ant", received a judgment in the sum of \$25,407.00 and \$37.15; That the said case is on appeal in the Supreme Court; That the plaintiff, Dachner, collected the money by execution thereby obtaining a preference in the sum of	25,407.00
and costs of	37.15
That a suit shall be commenced at once to repay the last two sums to the trustee in bankruptcy when appointed.	
John H. Somers, besides wages, loaned the Union Lead Mining & Smelter Company, a Corporation, \$35,000.00 in money and money advanced for material purchased; originally the claim was \$35,000.00 and John H. Somers was allowed a credit of \$15,000.00, leaving due him.....	20,000.00
W. K. McMillan—wages	7,500.00
Total.....	\$87,069.15

[Marginal note in longhand]: Sent Notices to: Gibson, F. G. 305-307 Hughes Bldg., 252 W. 1st St., Reno. Loaned Union account Bal. \$2248.40 and per note 25.00. Handed him notice of 1st meeting of creditors.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Trustee's Exhibit No. 2—(Continued)

Schedule A-4

Liabilities on Notes or Bills Discounted Which Ought to be Paid
by the Drawers, Makers, Acceptors or Indorsers

(N.B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.)

On page 2 are set forth moneys due on Production Certificates which are secured by a note and trust deed, in which Warren E. Baldy is trustee, and the Union Lead Mining and Smelter Company is the debtor and promisor of note.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner,
President

Schedule A-5

Accommodation Paper

(N.B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as a drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

See prior pages setting forth Production Certificates secured by trust deed and promissory note.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Trustee's Exhibit No. 2—(Continued)

Oath to Schedule A

State of Nevada,
County of Washoe—ss.

I, John H. Somers, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ JOHN H. SOMERS, Petitioner

Subscribed and sworn to before me this 5th day of February, 1948.

[Seal] /s/ WILLIAM S. BOYLE,
Notary Public, Washoe Co., Nevada.

Schedule B—Statement of all Property of
Bankrupt

Schedule B-1—Real Estate

NONE

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-2—Personal Property

(a) 300,000 shares of Imperial Lead Mines, Incorporated, stock, \$1.00 par value stock was sold at 15 cents a share.

(b) Negotiable and non-negotiable instruments, and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately). None.

(c) Stock in trade in business of at of the value of.....: An office full of office furniture held in trust by H. Cowden, Clay Peters Building, Reno, Nevada.

Trustee's Exhibit No. 2—(Continued)

- (d) Household goods and furniture, household stores, wearing apparel and ornaments of the person: None.
- (e) Books, prints and pictures: None.
- (f) Horses, cows, sheep and other animals (with number of each): None.
- (g) Automobiles and other vehicles: None.
- (h) Farming stock and implements of husbandry: None.
- (i) Shipping and shares in vessels: None.
- (j) Machinery, fixtures, apparatus and tools used in business, with the place where each is situated: None.
- (k) Patents, copyrights and trade-marks: None.
- (l) Goods or personal property of any other description, with the place where each is situated: None.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-3—Choses in Action

- (a) Debts due petitioner on open account: \$200,000.00 to be paid to the Union Lead Mining and Smelter Company out of 15% of Net returns from mine production, which is speculative.
 - (b) Policies of Insurance: None.
 - (c) Unliquidated claims of every nature, with their estimated value: Furniture held in trust by Harry Cowden, Clay Peters Building, Reno, Nevada, value speculative—about \$500.00.
 - (d) Deposits of money in banking institutions and elsewhere: None.
- Total, \$500.00.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-4

Property in Reversion, Remainder, or Expectancy, including property held in Trust for the Debtor, or subject to any power or right to dispose of or to charge.

(N.B.—A particular description of each interest must be entered,

Trustee's Exhibit No. 2—(Continued)

with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all, or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

Particular Description	Estimated Value of Interest
Interest in land:	None
Personal Property: Office furniture in possession of Harry Cowden, Clay Peters Building, Reno, Nevada, value speculative—about	\$500.00
Rights and powers, legacies and bequests.....	None
Total.....	\$500.00

	Amount realized as pro- ceeds of property conveyed
Property heretofore conveyed for the benefit of creditors....	None
Portion of debtor's property conveyed by deed of assign- ment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor	None
Attorney's fees. Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bank- ruptcy: A sum or sums of money have been paid to Brown and Wells which could be designated a consid- erable sum, but amount unknown.	
Paid within four (4) months sum about \$10,000.00....	\$10,000.00

Total.....	\$10,000.00
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UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Trustee's Exhibit No. 2—(Continued)

Schedule B-5

Property Claimed as Exempt from the Operation of the Act of
Congress Relating to Bankruptcy

(N.B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption:
None.

Property claimed to be exempt by State laws, with reference to the statute creating the exemption: None.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-6

Books, Papers, Deeds and Writings Relating to Bankrupt's
Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books: Several in office of Warren E. Baldy, First National Bank Building, Carson City, Nevada.

Deeds: In office of William S. Boyle, 335 Gazette Building, Reno, Nevada.

Papers: In office of William S. Boyle, 335 Gazette Build-

Trustee's Exhibit No. 2—(Continued)

ing, Reno, Nevada, various papers, court proceedings and documents.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Oath to Schedule B

State of Nevada,
County of Washoe—ss.

I, John H. Somers, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all Petitioner's property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ JOHN H. SOMERS, Petitioner

Subscribed and sworn to before me this 5th day of February, 1948.

[Seal] /s/ WILLIAM S. BOYLE,
Notary Public, Washoe Co., Nevada

Summary of Debts and Assets

(From the statements of the debtor in Schedules A and B)

Schedule A.

1-a. Wages	\$ 56,000.00
1-b. (1) Taxes due United States	None
1-b. (2) Taxes due States	None
1-b. (3) Taxes due Counties, Districts and Municipalities	None
1-c. (1) Debts due any person including the United States, having priority by laws of the United States	None
1-c. (2) Rent having priority	None
2. Secured claims	672,100.00

Trustee's Exhibit No. 2—(Continued)

4.	Notes and bills which ought to be paid by other parties thereto	None
	Schedule A, total.....	\$728,100.00

Schedule B.

2-a.	Cash on hand	\$ 2,000.00
2-l	Other personal property, Office Furniture.....	500.00
	Schedule B, total	\$ 2,500.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner,
President.

[Endorsed]: Filed Feb. 7, 1948.

TRUSTEE'S EXHIBIT No. 3

In the Second Judicial District Court of the State
of Nevada, in and for the County of Washoe

No. 107,708

R. H. DACHNER, doing business under the firm
name and style of "Pacific Machinery & Engi-
neering Company," Plaintiff,

vs.

UNION LEAD MINING AND SMELTER COM-
PANY, a Nevada Corporation, Defendant.

JUDGMENT

The above entitled action coming on regularly for trial, before the above entitled court sitting without a jury, a trial by jury having been waived by the parties hereto.

The plaintiff, appeared personally and by his Attorneys, Brown and Wells, and the defendant filed a verified answer and cross complaint in said action and appeared by its Attorney, William S. Boyle, and said cause coming on for trial and all the pleadings herein; thereupon evidence was introduced in said cause by plaintiff and defendant and the matter was submitted to the court for its decision, and the court having heretofore filed its decision, and the court having heretofore filed herein its opinion, and Findings of Fact and Conclusions of Law, wherein it finds for the plaintiff and against the defendant and awarded judgment to plaintiff

Trustee's Exhibit No. 3—(Continued)

in the sum of Twenty Five Thousand Four Hundred Sixty-Seven and Seven One Hundredths Dollars (\$25,467.07), and plaintiff's costs of suit.

Now Therefore, by reason of the law and said findings it is Ordered and Adjudged that plaintiff, R. H. Dachner, do have and recover of defendant, Union Lead Mining and Smelter Company, the sum of Twenty Five Thousand Four Hundred Sixty-Seven and Seven One Hundredths Dollars (\$25,467.07), lawful money of the United States, with interest thereon at the rate of seven per cent (7%) per annum from the 22nd day of May, 1947, until paid; together with costs and disbursements in the sum of Thirty Seven Dollars and Fifteen Cents (\$37.15).

Done in Open Court this 16th day of June, 1947.

/s/ A. J. MAESTRETTI,
District Judge

[Endorsed]: Filed June 16, 1947.

EXECUTION

The State of Nevada,

To the Sheriff of Washoe County, Greeting:

Whereas, on the 16th day of June, A.D. 1947 R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Company", Plaintiff, recovered a judgment in the Second Judicial District Court, of the State of Nevada, in and for Washoe County, against De-

Trustee's Exhibit No. 3—(Continued)

fendant, Union Lead Mining and Smelter Company, a Nevada corporation, for the sum of Twenty Five Thousand Four Hundred and Sixty Seven & 7/100 Dollars (\$25,467.07) in lawful money of the United States, damages, with interest on \$25,467.07 at the rate of 7 per cent per annum till paid, together with costs and disbursements amounting to the sum of \$37.15, as appears to us of record.

And Whereas, the judgment roll in the action in which said judgment was entered is filed in the Clerk's office of said Court, in the County of Washoe and the said judgment was docketed, in the said Clerk's office, in the said County, on the day and year first above written; and the above stated sums are now actually due on said judgment.

Now You, the Said Sheriff, are hereby commanded to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of said debtor, defendant above named, or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said Defendant, Union Lead Mining and Smelter Company, a corporation, in trust or otherwise, on the day whereon said judgment was docketed, in the aforesaid county, or at any time thereafter; and make return to this writ within sixty days with what you have done endorsed thereon.

Witness, Hon. A. J. Maestretti, one of the Judges of the said Court, at the Court House in the County

Trustee's Exhibit No. 3—(Continued)

of Washoe, this 20th day of November, A.D. 1947.

Attest my hand and the Seal of said Court the day and year last above written.

[Seal] E. H. BEEMER, Clerk,
/s/ By H. K. BROWN, Deputy Clerk

Sheriff will collect of Amount of Judgment, \$25,-
467.07; Costs, \$37.15.

Sheriff's Office,
County of Washoe, State of Nevada—ss.

I, Ray J. Root, Sheriff of Washoe County, Nevada, do hereby certify and return that under and by virtue of the within and hereunto annexed Writ of Execution by me received on the 20th day of November, A.D. 1947, I did, on the 20th day of November, A.D. 1947, levy upon all moneys goods, credits, effects, debts due or owing and all other personal property belonging to the within named defendant Union Lead Mining and Smelting Company, a Nevada corporation, in the possession or under the control of the Nevada Bank of Commerce, Reno, Nevada, said levy being made by delivering to the said Nevada Bank of Commerce a copy of said Writ of Execution annexed to a Notice of what was levied upon and demanding from them a statement.

I further return that on the 20th day of November, A.D. 1947, I received from said Nevada Bank of Commerce the sum of \$26,266.81, which I

Trustee's Exhibit No. 3—(Continued)

have turned over to the Attorney's for Plaintiff and have taken their receipt for the same and I herewith return said Writ of Execution satisfied in the sum of \$26,266.81, and unsatisfied in the sum of \$148.30, as follows, to-wit:

Principal amount of Judgment.....	\$25,467.07
Interest to date of Sale.....	777.44
Costs	37.15
Sheriff's Fee and Commission.....	133.45
	<hr/>
	\$26,415.11
Amount Received	26,266.81
	<hr/>
Unsatisfied	\$ 148.30

Dated this 3rd day of December, 1947.

RAY J. ROOT,

Sheriff of Washoe County, Nevada

/s/ By GEO. W. LOTHROP,

Under Sheriff

[Endorsed]: Filed Dec. 4, 1947.

Trustee's Exhibit No. 3—(Continued)

In the Supreme Court of the State of Nevada

No. 107,708

UNION LEAD MINING & SMELTER CO., a
Nevada Corporation, Appellant,

vs.

R. H. DACHNER, doing business under the firm
name and style of "Pacific Machinery & En-
gineering Co.", Respondent.

Appeal from the Second Judicial District Court
in and for Washoe County, Nevada.

Hon. A. J. Maestretti, Judge.

Robert Emmet Berry, Esq., W. E. Baldy, Esq.,
and William S. Boyle, Esq., Attorneys for Ap-
pellant. Morgan, Brown & Wells, Esqs., Attorneys
for Respondent.

REMITTITUR

No. 3499

This case came on regularly to be heard on the
18th day of May, A. D. 1948, it being a regular day
of the April, A. D. 1948 term of this court, when
William S. Boyle, Esq., of counsel for Appellant,
and Ernest S. Brown, Esq., of counsel for Respond-
ent, both being in court, were each duly heard in
oral argument on the merits of the case for their
respective clients.

Now, on this day, all and singular the law and

Trustee's Exhibit No. 3—(Continued)

the premises having been seen, heard and duly considered, and the court being fully advised in the law, files with the clerk of this court its opinion in writing by Badt, J., concurred in by Horsey, J., and Brown, D. J., to the effect:

“It is evident from what we have said that the judgment must be reversed and the case remanded for a new trial, as the pleadings and findings cannot be modified in this court to meet the situation. It is accordingly ordered that the judgment and the order denying appellant's motion for new trial be, and the same hereby is, reversed and the case remanded to the district court for a new trial in accordance with the views herein expressed, and pursuant to such amendments in the pleadings as may be allowed in the discretion of the court and in accordance with any terms and conditions it may reasonably impose and whether made before such new trial or before submission of the cause in order to conform with the proofs. The appellant will recover its costs on this appeal.”

Note: Eather, C. J., being absent on account of illness, the governor commissioned Hon. Merwyn H. Brown, of the Sixth Judicial District Court, to sit in his stead.

Whereupon it is now ordered, adjudged and decreed that the judgment and order appealed from the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in the

Trustee's Exhibit No. 3—(Continued)

above entitled case, be, and the same is hereby reversed and the cause remanded for a new trial.

Judgment entered this 25th day of June, 1948.

Attest: Ned A. Turner, Clerk.

State of California—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the foregoing is a full and true copy of the Original Judgment of said Supreme Court in the following action: No. 3499, Union Lead Mining & Smelter Co., a Nevada Corporation, Appellant, vs. R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Co.," Respondent, as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 12th day of July, A. D., 1948.

[Seal] /s/ NED A. TURNER,

Clerk of the Supreme Court of the
State of Nevada

Trustee's Exhibit No. 3—(Continued)

[Title of Supreme Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Days in District Court—May 27, 28, 29, 1947.

Clerk's Fees—

In Supreme Court, Appeal.....\$25.00

In District Court, Answer 10.00 \$ 35.00

Filing Notice of Appeal in District Court... 5.00

Witness Fees—

John Somers, 3 days at \$3.00.....\$9.00

W. K. McMillan, 3 days at \$3.00.. 9.00

Erma Somers, 3 days at \$3.00..... 9.00 27.00

Court reporter per diem (1½)—\$5.00 per

day for three days 15.00

To Alice Warner—Transcript of Testimony 356.40

To Elwood Beemer—Transcript of Record.. 62.00

Total.....\$500.40

I hereby certify the foregoing bill to be just and correct, and that the filing fee in the Supreme Court of the same has been paid.

In Testimony Whereof, I have hereunto set my hand and the seal of the Supreme Court this 12th day of July, A.D. 1948.

[Seal] /s/ NED A. TURNER, Clerk

[Endorsed]: Filed June 23, 1948.

Trustee's Exhibit No. 3—(Continued)

In the Second Judicial District Court of the State
of Nevada in and for the County of Washoe

[Title of Cause.]

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the originals thereof, and that I am the keeper of said originals, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copies attached hereto are full, true and correct copies of the following: Judgment of June 16th, 1947, Execution with Sheriff's Return, and Remittitur, and now on file and of record in my office.

I do further certify that the same have not been altered, amended or set aside, but are still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 24th day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER, County Clerk

I, A. J. Maestretti, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding

Trustee's Exhibit No. 3—(Continued)

magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of the law.

Witness my hand this 24th day of July, A. D. 1951.

/s/ A. J. MAESTRETTI,

One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

State of Nevada,
County of Washoe—ss.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable A. J. Maestretti whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 24th day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER,
County Clerk and ex-officio Clerk of the Second
Judicial District Court of the State of Nevada,
in and for the County of Washoe.

TRUSTEE'S EXHIBIT No. 4

In the Second Judicial District Court of the State
of Nevada, in and for the County of Washoe

No. 107,708

R. H. DACHNER, doing business under the firm
name and style of "Pacific Machinery & En-
gineering Co.," Plaintiff,

VS.

UNION LEAD MINING & SMELTER CO., a
Nevada Corporation,

I hereby certify that I am the duly elected, qualified and acting clerk of the above entitled Court, that I have the custody of all of the files, pleadings, orders and records of said Court, that I have examined the said files, pleadings, orders and records and do hereby certify that no Trustee in Bankruptcy and no Trustee in Reorganization, ever became a party to, or entered any appearance in the above entitled action.

July 21st, 1951.

/s/ E. H. BEEMER, County Clerk

I, E. H. Beemer, County Clerk and ex-officio

Trustee's Exhibit No. 4—(Continued)

Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy attached hereto is a full, true and correct copy of the As Per Attached Statement and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside but is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 21st day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER, County Clerk

I, A. J. Maestretti, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of

Trustee's Exhibit No. 4—(Continued)

signing said attestation, ex-officio clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of the law.

Witness my hand this 21st day of July, A. D. 1951.

/s/ A. J. MAESTRETTI,

One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

State of Nevada,
County of Washoe—ss.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable A. J. Maestretti, whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 21st day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER,

County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

TRUSTEE'S EXHIBIT No. 5

In the District Court of the United States
for the District of Nevada

In Bankruptcy—No. 743 A-58-A

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, Bankrupt.

CERTIFICATE OF REFEREE

I, Frank W. Ingram, do hereby certify that I am the duly appointed, qualified and acting Referee in Bankruptcy for the United States District Court for the District of Nevada, having custody of the files, pleadings and proceedings in the above-entitled matter; that I have examined the files, pleadings and proceedings in the above-entitled matter and do hereby certify that no application was ever made in the above-entitled proceeding by R. H. Dachner or by anyone else for authority to liquidate their claim in any State Court proceeding and that no order was ever made or entered in this proceeding authorizing the said R. H. Dachner or any other person to liquidate any claim in any State Court proceeding.

Dated at Reno, Nevada, this 24th day of July,
1951.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

TRUSTEE'S EXHIBIT No. 6

United States District Court for the
District of Nevada

No. A-58-A

In Reorganization under Chapter X of the
Bankruptcy Act

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, Debtor.

CERTIFICATE OF CLERK

I, the undersigned, do hereby certify that I am the duly appointed, qualified and acting Clerk of the above-entitled Court, having in my possession the files, pleadings and proceedings in the above-entitled matter.

That I have examined the files, pleadings and proceedings in my possession and do hereby certify that no application was ever made to this court by R. H. Dachner or anyone in his behalf or by any other person for authority to litigate the claim of R. H. Dachner in any State Court proceeding, and that no order was ever made and entered in the above-entitled proceeding authorizing the said R. H. Dachner to litigate his claim in any State Court proceedings.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-

Trustee's Exhibit No. 6—(Continued)

said Court at Carson City, Nevada, this 24th day of July, 1951.

[Seal] AMOS P. DICKEY, Clerk
/s/ By O. F. PRATT, Chief Deputy Clerk

RESPONDENT'S EXHIBIT No. 1

In the Supreme Court of the State of Nevada

CLERK'S CERTIFICATE

State of Nevada—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of Supreme Court of said State of Nevada, do hereby certify that I have custody of all records in connection with appeals taken from all District Courts in the State of Nevada to the Supreme Court. That I have examined my files and records thoroughly and have found two appeals wherein R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Company", is respondent and Union Lead Mining and Smelter Company, a Nevada Corporation, is appellant being cases No. 3499 and 3578 respectively and that in neither of said appeals has any trustee in bankruptcy or trustee in reorganization intervened or become a party or taken any part in the proceedings so far as the records in my office disclose.

In Witness Whereof, I have hereunto set my

Respondent's Exhibit No. 1—(Continued)

hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 17th day of July, A. D. 1951.

[Seal] /s/ NED A. TURNER,
 Clerk of Supreme Court of the State
 of Nevada

CLERK'S CERTIFICATE

State of Nevada—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of Supreme Court of said State of Nevada, do hereby certify that Case No. 3578 an appeal from the Second Judicial District Court Washoe County, Reno, Nevada, entitled Union Lead Mining & Smelter Co., a Nevada Corporation, Appellant, vs. R. H. Dachner, doing business under the firm name and style of Pacific Machinery & Engineering Co., Respondent, is pending in this Court and is set for oral argument for Tuesday, September 4, 1951, at the hour of 10:00 a.m.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 19th day of July, A. D. 1951.

[Seal] /s/ NED A. TURNER,
 Clerk of Supreme Court of the State
 of Nevada

RESPONDENT'S EXHIBIT No. 2

In the District Court of the United States
for the District of Nevada

In Bankruptcy—No. 743

In the Matter of UNION LEAD MINING AND
SMELTER CO., Bankrupt.

**REFEREE'S CERTIFIED RECORD OF
PROCEEDINGS**

Of Certain Exhibits: Debtor's petition in bankruptcy filed February 7, 1948. Exhibits Deed of Trust dated September 25, 1947. Debtor's petition for corporate reorganization filed Oct. 25, 1948. Notice of recessed first meeting of creditors January 8, 1951.

I, Frank W. Ingram, one of the Referees in Bankruptcy in and for said District do hereby certify the following to be the true and correct Referee's Record of Proceedings in the above entitled matter.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

Respondent's Exhibit No. 2—(Continued)

In the Supreme Court of the State of Nevada

UNION LEAD MINING & SMELTER CO., a
Nevada Corporation, Appellant,

vs.

R. H. DACHNER, doing business under the firm
name and style of "Pacific Machinery & En-
gineering Co.," Respondent.

I, Ned A. Turner, Clerk of the Supreme Court of the State of Nevada, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of all said originals, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copies, attached hereto are full, true and correct photostatic copies of the (1) Receipt—Ex. A; (2) Order Dismissing the Appeal Upon Stipulation, Case No. 3499 dated November 26, 1947; (3) Document filed November 26, 1947, signed by W. E. Baldy of counsel for Appellant Case No. 3499; (4) Affidavit in Support of Subpoena Duces Tecum filed December 13, 1947, Case No. 3499; (5) Notice of Motion and Motion to Reconsider Order Dismissing Appeal in the Above Entitled Matter, and for an Order Reinstating Above Entitled Appeal, Case No. 3499; (6) Affidavit and Petition in Support of Motion to Reconsider Order Dismissing Appeal and Petitions for an Order Reinstating the

Respondent's Exhibit No. 2—(Continued)

Appeal being Case No. 3499 in the above entitled Court; (7) Order Granting Motion to Vacate Order Dismissing Appeal, and Reinstating Appeal filed January 28, 1948, Case No. 3499; also attached hereto are full, true and correct copies of the (1) Judgment filed June 16, 1947; (2) Judgment filed March 8, 1949. (The last two documents being copies of respective judgments, appearing in Bill of Exceptions.) Supreme Court Case No. 3578 and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside, but is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 18th day of July, A.D. 1951.

[Seal] /s/ NED A. TURNER,
Clerk of the Supreme Court

I, Milton B. Badt, Chief Justice of the Supreme Court of the State of Nevada, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; that Ned A. Turner, who has signed the annexed attestation, is the duly elected and qualified Clerk of the Supreme Court of the State of Nevada.

That said signature is his genuine handwriting and that all of his official acts as such Clerk are entitled to full faith and credit.

Respondent's Exhibit No. 2—(Continued)

And I further certify that said attestation is in due form of law.

Witness my hand this 18th day of July, A. D. 1951.

/s/ MILTON B. BADT,

Justice of the Supreme Court of the State of Nevada

State of Nevada,
County of Ormsby—ss.

I, Ned A. Turner, Clerk of the Supreme Court of the State of Nevada, do hereby certify that Milton B. Badt, whose name is subscribed to the preceding Certificate, is the Chief Justice of the Supreme Court, elected and qualified, and that the signature of said Justice to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 18th day of July, A. D. 1951.

[Seal] /s/ NED A. TURNER,

Clerk of the Supreme Court

Exhibit A—[In longhand]

Carson City, Nev.

Received of John H. Somers Cashier's Check No. 94-10/1212 for \$16,000.00 to be used for settlement Haskell account with Union Lead Mining & Smelter Co.

Accepted above.

/s/ B. DON BLACKWOOD

Respondent's Exhibit No. 2—(Continued)

Office of Clerk of Supreme Court

Carson City, Nev., November 26, 1947

[Title of Cause No. 3499.]

**ORDER DISMISSING THE APPEAL UPON
STIPULATION**

In Chambers: Present: Hon. Edgar Eather, C.J.,
Hon. Chas. Lee Horsey, J., Hon. Milton B. Badt, J.

Upon the written stipulation and request of Union Lead Mining & Smelter Co., Appellant, and with the written consent of R. H. Dachner, Respondent, duly filed here by their respective counsel, and good cause appearing therefor, It Is Hereby Ordered that Appellant's appeal from the judgment of the District Court and its appeal from the order of said Court denying its motion for a new trial, be and the same hereby are dismissed without costs to the Appellant.

Done at Carson City, Nevada, this 26th day of November, 1947.

Attest: Ned A. Turner, Clerk.

cc—Robert Emmet Berry, Esq., W. E. Baldy, Esq.,
William S. Boyle, Esq., Morgan, Brown &
Wells, Esqs., John H. Somers, Esq.

[Title of Supreme Court and Cause No. 3499.]

The Appellant, Union Lead Mining & Smelter Co., a Nevada corporation, by and with the consent

Respondent's Exhibit No. 2—(Continued)

of Respondent, hereby dismisses with prejudice, the appeal heretofore taken by it in the above entitled cause, from a judgment rendered against it in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, for \$25,467.07, and \$37.15 costs, and from the order overruling defendant's—appellant herein— motion for a new trial; that said appeal be dismissed without costs to Appellant.

Dated this 26th day of November, 1947.

/s/ UNION LEAD MINING &
SMELTER CO.,

Appellant

/s/ W. E. BALDY,

Counsel for Appellant

[Endorsed]: Filed Nov. 26, 1947.

[Title of Supreme Court and Cause No. 3499.]

AFFIDAVIT IN SUPPORT OF SUBPOENA
DUCES TECUM

State of Nevada,
County of Washoe—ss.

Ernest S. Brown, being first duly sworn, deposes and says:

That he is one of the attorneys for Respondent herein; that on the 26th day of November, 1947, this Honorable Court entered an order dismissing the above-entitled appeal at the request of Warren

Respondent's Exhibit No. 2—(Continued)

E. Baldy with the consent of Messrs. Brown & Wells, attorneys for Respondent; that Warren E. Baldy is one of the attorneys for Appellant herein.

That on or about the 6th day of December, 1947, one William S. Boyle did file herein a "Notice of Motion and Motion to Reconsider Order Dismissing Appeal in the above-entitled Matter, and for an Order Restraining above-entitled Appeal", supported by the affidavit of said William S. Boyle.

That prior to the dismissal aforesaid the aforesaid Warren E. Baldy, in a telephone conversation with your Affiant, which was heard by Robert W. Wells, one of the attorneys for Respondent herein, did advise your Affiant that the said William S. Boyle had resigned as a director of the Appellant herein and did withdraw as its counsel in this matter; that in support of said statement the said Warren E. Baldy did purport to read to your Affiant a telegram, or letter, received by him from the said William S. Boyle to the aforesaid effect; that your Affiant is informed and believes, and therefore avers the fact to be, that the said William S. Boyle was not one of the attorneys for the Appellant at the time of filing herein a "Notice of Motion and Motion to Reconsider Order Dismissing Appeal in the above-entitled Matter, and for an Order Reinstating above-entitled Appeal", and the affidavit aforesaid; that to prove said fact your Affiant at the hearing of said motion desires to cross-examine Warren E. Baldy aforesaid as an adverse witness

Respondent's Exhibit No. 2—(Continued)

and to present to the consideration of this Honorable Court his testimony regarding the dismissal aforesaid and the telegram, or letter, aforesaid if the same was received by the said Warren E. Baldy.

That relying upon the aforesaid dismissal, the said judgment obtained in the lower court was satisfied, the moneys have been disbursed by the Respondent, and that a grave injustice would result to him if he were required to again impound this sum of money for the purpose of awaiting the outcome of any order reinstating the appeal in this particular matter. That the dismissal of said appeal was also a consideration of settlement of further litigation pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, which resulted in the dismissal of said litigation and the acceptance of certain sums of money from the Appellant in this matter by third parties in said litigation. That there appears nowhere in the affidavit or showing of purported counsel for Appellant, William S. Boyle, that he had any special lien or contract with the Appellant concerning the prosecution of the appeal thereon. That this has been settled controversy with prejudice, and an further proceedings herein will result in a moot question being presented to this Honorable Court.

Wherefore, your Affiant respectfully prays that a Subpoena Duces Tecum be issued by this Honorable Court, commanding and directing the attend-

Respondent's Exhibit No. 2—(Continued)

ance before this Honorable Court of Warren E. Baldy and the production by him of the telegram, or letter, aforesaid at the time and place set for the hearing of the Motion of William S. Boyle to consider order dismissing this appeal and for an order reinstating this appeal.

/s/ ERNEST S. BROWN

Subscribed and Sworn to before me this 12th day of December, 1947.

[Seal] /s/ ROBERT W. WELLS,
Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: Filed Dec. 13, 1947.

[Title of Supreme Court and Cause No. 3499.]

NOTICE OF MOTION AND MOTION TO RE-
CONSIDER ORDER DISMISSING AP-
PEAL IN THE ABOVE-ENTITLED MAT-
TER, AND FOR AN ORDER REINSTAT-
ING ABOVE-ENTITLED APPEAL

To R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Company", and to his attorneys, Brown & Wells, Reno, Nevada:

You, and each of you, will please take notice that the above-entitled appellant by and through

Respondent's Exhibit No. 2—(Continued)

its attorneys, William S. Boyle and Robert Emmet Berry, and other counsel appearing for counsel in case of sickness or emergency, will on Monday, December 14th, 1947, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard, move the above-entitled Supreme Court for the following order or orders;

1.

To set aside the order, dated November 26th, 1947, dismissing the above-entitled appeal.

2.

For an order of Court reinstating the appeal dismissed on the 26th day of November, 1947, and known as Case No. 3499.

That at the time of making this motion counsel will rely upon all papers on file in the above-entitled matter, and the Notice of Motion and Motion and the Affidavit and Petition in support of Motion to reconsider order dismissing appeal and Petitions for an order reinstating the appeal, being Case No. 3499 in the above Court, and oral argument of counsel.

Dated: December 6th, 1947.

/s/ WILLIAM S. BOYLE,

/s/ ROBERT EMMET BERRY,

Counsel for Appellants and Movant

Respondent's Exhibit No. 2—(Continued)

[Title of Supreme Court and Cause.]

AFFIDAVIT AND PETITION IN SUPPORT
OF MOTION TO RECONSIDER ORDER
DISMISSING APPEAL AND PETITIONS
FOR AN ORDER REINSTATING THE
APPEAL, BEING CASE No. 3499 IN THE
ABOVE COURT

State of Nevada,
County of Washoe—ss.

Comes Now William S. Boyle, chief counsel for appellant in the trial of the Case before the District Court, and for the preparation and subsequent appeal of Case No. 3499 before the above-entitled Court, and respectively shows:

I.

That William S. Boyle filed the appeal in good faith, and the record and briefs are here referred to and made part of this petition; That the appeal is a meritorious action and cannot be dismissed without causing irreparable injury to appellant; That the Case was tried and appeal prepared by William S. Boyle.

II.

That the records in the Supreme Court will show that the Case was set down for argument some time ago, and William S. Boyle was ill in St. Mary's Hospital and his condition was diagnosed as grave.

Respondent's Exhibit No. 2—(Continued)

III.

That William S. Boyle requested Mr. Baldy to appear before the Court, and to assist him William S. Boyle gave Mr. Baldy an outline of his argument; That Mr. Baldy went before the Court after saying—"That he did not know anything about the matter and had the oral argument continued until or about January 13th, 1948, in the Supreme Court".

IV.

That without notice to William S. Boyle, Mr. Baldy recently appeared in the Supreme Court and filed, or caused to be filed, a stipulation asking for an order for the dismissal of the appeal; That the stipulation, according to a letter received from the Honorable Ned Turner, Clerk of the Supreme Court, was signed: "The Union Lead Mining and Smelter Company, and W. E. Baldy, or Warren E. Baldy, Counsel for Appellant."

V.

That the stipulation for order for dismissal was not authorized by a resolution voted upon by a majority of the Board of Directors, or at all, by the Union Lead Mining and Smelter Company, appellant;

That Mr. Baldy had no right to dismiss the appeal until consented to by appellant and counsel.

VI.

That the dismissal of the appeal was obviously motivated by Don Blackwood, who at times during

Respondent's Exhibit No. 2—(Continued)

the trial worked and testified against his own company, the Union Lead Mining and Smelter Company, in favor of respondent. At the time, Blackwood was and is now a Director of the appellant corporation; That W. E. Baldy was and is Secretary of the appellant corporation; That his action toward William S. Boyle, whom he regarded as Chief Counsel in the Case, is inexplicable, and particularly after he, Baldy, had the matter continued until January 13th, 1948, or thereabout.

VII.

That the appellant paid all costs in advance; That the appellant was very optimistic of success before the Supreme Court, but nevertheless Mr. Baldy requested the matter to be dismissed with no costs to appellant.

VIII.

Mr. Baldy knew of the desire of William S. Boyle to argue the appeal, or to submit the matter, without argument if deemed necessary.

IX.

That trust funds had been created to pay the full amount of the judgment rendered in the District Court, with interest to protect the interests of respondent; That a like trust fund was created to pay other claimants if necessary, and the said funds were created without the demand of respondent.

X.

That a suit was commenced by one H. Cowden

Respondent's Exhibit No. 2—(Continued)

representing himself, wife, and daughter, and one F. Haskell against the Imperial Lead Mines, Inc., successor to appellant, and appellant knew that Haskell was entitled to part of the sum of money held in trust to redeem Haskell's claim, and was prepared to pay a certain sum of money; That the respondents knew that William S. Boyle would not settle any claim with respondents until the Supreme Court of Nevada affirmed any judgment rendered in the District Court arising in Department No. 2, in Washoe County, Nevada.

The respondent in Case No. 3499 with Blackwood, who testified against appellant all through the District Court action, demanded of W. E. Baldy, Secretary for appellant corporation, that he dismiss the appeal and the same was done without notice to William S. Boyle, whom Baldy and Blackwood knew would not permit such action until the dismissal was authorized by a majority vote of the Board of Directors of the Union Lead Mining and Smelter Company, a corporation; The President of the corporation is hostile to the dismissal.

XI.

That Mr. Baldy was not joined by Mr. Robert Emmet Berry, associate counsel of William S. Boyle, in asking dismissal of appeal or any stipulation thereto.

XII.

That appellant will suffer irreparable injury and damage if the order dismissing the appeal is not

Respondent's Exhibit No. 2—(Continued)

set aside and the appeal reinstated; That the law points to be decided by the Supreme Court are of infinite value to Nevada.

Wherefore, the Union Lead Mining and Smelter Company prays that the order dismissing the appeal in Case No. 3499 be reconsidered and the same set aside for the reasons above set forth, and the order dismissing the appeal be set aside and the appeal be reinstated the reasons hereinbefore set forth.

/s/ WILLIAM S. BOYLE,
Petitioner

Subscribed and sworn to before me this 6th day of December, A. D. 1947.

[Seal] /s/ RALPH MORGALI,
Notary Public, Washoe County, Nevada. My commission expires Feb. 4, 1948.

[Endorsed]: Filed Dec. 8, 1947.

[Title of Supreme Court and Cause No. 3499.]

January 27, 1948

ORDER GRANTING MOTION TO VACATE
ORDER DISMISSING APPEAL, AND
REINSTATING APPEAL

On December 15, 1947, pursuant to notice to respondent, the appellant moved this court to vacate an order made and filed November 26, 1947, dis-

Respondent's Exhibit No. 2—(Continued)

missing said appeal. Said order of dismissal of November 26, 1947, was made pursuant to a written stipulation for dismissal. This stipulation comprised one instrument signed "Union Lead Mining & Smelter Co., Appellant. W. E. Baldy, of counsel for Appellant," and a second instrument comprising a consent to such dismissal signed by Brown & Wells, attorneys for plaintiff and respondent.

The notice of such motion to restore the appeal was signed by William S. Boyle and Robert Emmet Berry, as counsel for appellant. Such latter motion was partly heard and argued on December 15, 1947, and thereafter on January 27, 1948, further presented, argued and submitted.

The original dismissal of the appeal apparently was made pursuant to informal action of three of the five directors, B. Donald Blackwood, W. E. Baldy and O. M. Floe, and without the knowledge or consent of William S. Boyle, chief counsel for appellant, or his associate, Mr. Berry.

The motion to reinstate the appeal was made pursuant to informal action of four of the five directors, namely, John H. Somers, W. E. Baldy, W. K. McMullen and O. M. Floe.

Such later action, it will be observed, repudiated the former action authorizing the dismissal, and in such repudiation, Directors Somers and Baldy joined, although they had participated in the original authorization of the dismissal.

Although counsel for respondent, in opposing the

Respondent's Exhibit No. 2—(Continued)

motion to restore the appeal, insisted upon the right of W. E. Baldy, as one of the attorneys for appellant, to bind his clients in the dismissal of the appeal, he submitted his view that the matter lay entirely within the discretion of the court.

The appeal was perfected July 23, 1947, and the record on appeal, comprising two large volumes (the transcript of the testimony comprising almost 600 pages in itself), was filed in this court July 25, 1947. The opening brief on appeal was filed July 25, 1947, the answering brief August 14, 1947, and the reply brief on August 20, 1947. Argument on the appeal was postponed by reason of Mr. Boyle's illness to January 13, 1948. In the meantime, the matter was further complicated by a transfer of the appellant's property by discovery by the purchaser that there were outstanding numerous "production certificates" issued by the respondent and in turn secured by a deed of trust upon the property, and that suits were threatened or pending on the part of sundry stockholders of the appellant corporation. It further appeared that the purchaser of appellant's property had deposited in trust a part of the purchase price to protect itself against a possible judgment lien against the property in the event of an affirmance of the judgment.

No transcript was made of the proceedings before this court on the motion to reinstate the appeal, and the situation above outlined is taken from notes made by the Justices and may not be accurate in

Respondent's Exhibit No. 2—(Continued)

all details. It is clear, however, that there has been some dissension among the directors of the appellant corporation and that neither the original action of what was then a majority of the directors authorizing the dismissal nor the later order made by what was then a majority of the board of directors repudiating the dismissal was formal, corporate action of the corporation. In neither case was the purported resolution of the directors had at a regular meeting of such directors, or at a special meeting of such directors held pursuant to notice, or at a meeting held by the consent of all of the directors, or whose action was approved by all of the directors. The bylaws were not submitted to the court.

It has been made clear to the court that the consummation of the purchase of appellant's mining property, the payment of the purchase price, the release of funds impounded pending the present appeal and the continued operation of the mining property by appellant's successor will be contingent upon the conclusion, dismissal or settlement of other actions in addition to the present appeal. The affidavit of Mr. Boyle, supported by appellant's voluminous brief, signed by Mr. Boyle, Mr. Baldy and Mr. Berry, and its reply brief signed by the same counsel, as well as the lengthy record on appeal, indicate that the appeal was taken in good faith and in reliance upon the opinion of counsel for appellant that the points raised were well taken.

Without passing upon the general proposition of

Respondent's Exhibit No. 2—(Continued)

law as to the authority of junior counsel to dismiss an appeal contrary to the wishes of senior counsel and the latter's associate as applied to the particular facts of this case (in support of the original dismissal by Mr. Baldy there was introduced Mr. Boyle's written resignation as secretary and his "withdrawal from all law suits and litigation wherein the Union Lead Mining & Smelter Co. is a party, dated November 18, 1947," and it was further made to appear that Mr. Boyle's fees had not been paid), we are of the opinion that the reinstatement of the appeal will result in less danger of injustice to the parties.

By reason of the matters above set forth and good cause appearing therefor

It Is Hereby Ordered that the motion to reinstate said appeal be, and the same hereby is, granted; that the order of November 26, 1947, dismissing said appeal, be, and the same hereby is, vacated; and that said appeal be, and the same hereby is, restored and reinstated; and that time for oral argument of said appeal be hereafter set by the court on the calling of its next calendar or otherwise or upon stipulation of counsel for the respective parties.

Done in Chambers this 27th day of January, 1948.

/s/ HORSEY,

Justice

/s/ BADT,

Justice

Respondent's Exhibit No. 2—(Continued)

Eather, C. J., being absent on account of illness, it was stipulated by counsel for the respective parties to the motion that the same might be presented and submitted to Horsey and Badt, JJ.

cc—William S. Boyle, Robert Emmet Berry, W. E. Baldy, Brown & Wells, Ralph Morgali.

[Endorsed]: Filed Jan. 28, 1948.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

No. 107,708

R. H. DACHNER, doing business under the firm name and style of "Pacific Machinery & Engineering Company," Plaintiff,

vs.

UNION LEAD MINING AND SMELTER COMPANY, a Nevada Corporation, Defendant.

JUDGMENT

Whereas, the Honorable A. J. Maestretti made and ordered to be served the following decision in the above entitled matter:

Decision of the Court

The Court: In this case the remittitur of the Supreme Court stated:

"It is evident from what we have said that the judgment must be reversed and the case remanded

Respondent's Exhibit No. 2—(Continued)

for a new trial, as the pleadings and findings cannot be modified in this Court to meet the situation. It is accordingly ordered that the judgment and the order denying appellant's motion for new trial be, and the same hereby is, reversed and the case remanded to the District Court for a new trial in accordance with the views herein expressed, and pursuant to such amendments in the pleadings as may be allowed in the discretion of the Court and in accordance with any terms and conditions it may reasonably impose and whether made before such new trial or before submission of the cause in order to conform with the proofs. The appellant will recover its costs on this appeal."

When the remittitur was received in this court and counsel appeared in court, the Court asked of counsel what if any amendments they wished to make to any of the pleadings; and none of counsel suggested any amendments, the plaintiff specifically standing upon his pleadings as they were in court.

Consequently, the remittitur requirements for the allowance of amendments was voided by the action of counsel for the respective parties, who refused and still refuse to offer or make any amendments. This motion for dismissal of the action, therefore, was made by the party who prevailed at the initial trial; and inasmuch as neither of the litigants has suggested any amendments to their pleadings, it is not probable that a different result would be had in a new trial upon the same pleadings.

Respondent's Exhibit No. 2—(Continued)

The Court finds that it has jurisdiction to hear and determine the motion to dismiss.

The Court further finds that the settlement was made between the parties as alleged in the motion and the affidavit in support thereof.

The Court finds that the settlement was made without the presence of fraud or undue influence.

The Court finds that the settlement was made between competent parties.

The Court finds that the plaintiff herein and the Cowden-Haskell people did have legal reason to believe that Blackwood and Morgali and Baldy had the authority to enter into the agreement.

It is therefore ordered that the motion to dismiss is granted with prejudice.

/s/ A. J. MAESTRETTI,
District Judge

Therefore in pursuance thereof,

It is the judgment of the Court that the motion to dismiss the above-entitled action is granted with prejudice.

Done in Open Court this the 8th day of March, 1949.

/s/ A. J. MAESTRETTI,
District Judge

[Endorsed]: Filed March 8, 1949.

Respondent's Exhibit No. 2—(Continued)

In the Second Judicial District Court of the State
of Nevada, in and for the County of Washoe

No. 107,708

[Title of Cause.]

JUDGMENT

The above entitled action coming on regularly for trial, before the above entitled court sitting without a jury, a trial by jury having been waived by the parties hereto.

The plaintiff, appeared personally and by his Attorneys Brown and Wells, and the defendant filed a verified answer and cross complaint in said action and appeared by its attorney, William S. Boyle, and said cause coming on for trial and all the pleadings herein; thereupon evidence was introduced in said cause by plaintiff and defendant and the matter was submitted to the court for its decision, and the court having heretofore filed its decision, and the court having heretofore filed herein its opinion, and Findings of Fact and Conclusions of Law, wherein it finds for the plaintiff and against the defendant and awarded judgment to plaintiff in the sum of Twenty-Five Thousand and Four Hundred Sixty-Seven One Hundredths Dollars (\$25,467.07) and plaintiff's costs of suit.

Now Therefore, by reason of the law and said Findings it is Ordered and Adjudged that plaintiff, R. H. Dachner, do have and recover of defendant,

Respondent's Exhibit No. 2—(Continued)

Union Lead Mining and Smelter Company, the sum of Twenty-Five Thousand Four Hundred Sixty-seven and Seven One Hundredths Dollars (\$25,467.07), lawful money of the United States, with interest thereon at the rate of seven percent (7%) per annum from the 22nd day of May, 1947, until paid; together with costs and disbursements in the sum of Thirty Seven Dollars and Fifteen Cents (\$37.15).

Done in Open Court this 16th day of June, 1947.

A. J. MAESTRETTI,
District Judge

[Endorsed]: Filed June 16, 1947.

In the Supreme Court of the State of Nevada

No. 3578

UNION LEAD MINING AND SMELTER COMPANY, a Nevada Corporation, Appellant, vs. R. H. DACHNER, Doing Business Under the Firm Name and Style of "Pacific Machinery & Engineering Company," Respondent.

Appeal from Second Judicial District Court, Washoe County; A. J. Maestretti, Judge, Department No. 2.

Affirmed.

John R. Ross, of Carson City, Nevada, and Leslie Riggins, of Reno, Nevada, for Appellant.

Ernest S. Brown, of Reno, Nevada, for Respondent.

OPINION

By the Court, Merrill, J.:

This is an appeal from an order of the trial court dismissing the action below. To state the matter conservatively, the case involves many confusing and unusual aspects. The parties will here be designated by name: appellant as "Union"; respondent as "Dachner." Dachner was the plaintiff below in an action for contract damages. Union was the defendant.

The first unusual aspect of the case is that the action of the trial court with which we are here concerned was taken pursuant to motion of the plaintiff Dachner to dismiss his own action. This

appeal from that order is taken by the defendant Union.

These unusual circumstances are explained by circumstances still more unusual. The appeal before us is the second appeal taken by Union in the course of this litigation. Earlier, Dachner secured judgment below and Union thereupon appealed from that judgment to this court. Pending that appeal Dachner executed upon property of Union and thereby, pending final determination of the matter, secured full satisfaction of his judgment. On appeal from the judgment, this court reversed the trial court and remanded the matter for a new trial; (*Dachner vs. Union Lead Mining and Smelter Co.*, 65 Nev. 313, 195 P.2d 208.) The dismissal of the action below followed, Dachner thereby, and the opinion of this court to the contrary notwithstanding, retaining the benefits of his execution upon the reversed judgment.

These unusual circumstances, in turn, are explained and justified by Dachner's contention that, pending the first appeal (that from the judgment), the action was settled by accord and satisfaction, under the terms of which Dachner retained the fruits of his execution. The motion to dismiss was presented below and was granted by the trial court upon the ground that such settlement rendered the action moot.

Union contends that if any settlement agreement ever was reached, it was without authority on the part of anyone to bind Union. Here we have reached the heart of the present controversy. Union

does not question the procedure followed in the trial court and no questions involving such procedure are before us. Union's position is simply that dismissal was not warranted under the facts. For proper consideration of that position, the outline of perplexities heretofore set forth must be somewhat elaborated.

Dachner secured judgment in the sum of \$25,467.07 on June 16, 1947. The month following, Union took its first appeal to this court. The succeeding events may be more easily assimilated if stated under separate headings.

The "Imperial" contract. On August 27, 1947, Union entered into a contract with Imperial Lead Mines, Inc. for sale to Imperial of all Union's mining properties and assets. Union was to receive 40 percent of the capital stock of Imperial and a note for \$200,000. The agreement recognized that Union had certain obligations which constituted liens against its properties and which were to be discharged by Union. If not so discharged, then they might be paid by Imperial and such payments credited against sums due to Union. Specified as one of these obligations was the Dachner judgment then pending on appeal. Also specified were certain "production certificates" then outstanding, being monetary obligations secured by trust deed and also constituting charges against future production of the mine.

The Dachner levy of execution. On November 20, 1947, Dachner successfully levied execution on

Union's bank account in satisfaction of his judgment then pending on appeal to this court.

The Cowden-Haskell action. Certain of Union's production certificates were held by one Cowden and one Haskell, both being Union stockholders. Imperial entered into a contract relative to acquisition of these certificates and stock holdings. On November 21, 1947, Cowden and Haskell brought action against Imperial based on this agreement and asking judgment in the sum of \$24,600. An attachment was levied against Imperial's bank account. While the action was brought against Imperial and was based on its contract, still under the terms of Union's contract with Imperial, the retiring of the production certificates remained primarily Union's obligation.

Preliminary settlement discussions. After commencement of this action, conferences were held between representatives of Union and Imperial. It was decided that rather than oppose the action, the certificates of Cowden and Haskell would be bought up by Union on the most favorable terms that could be secured by negotiation. A cashier's check for \$16,000 was secured by Union made payable to its president, Somers. It was then decided that in negotiations with Cowden and Haskell, Union would be represented by its vice-president, Blackwood. At the insistence of Ralph Morgali, Imperial's attorney, the cashier's check was then exchanged for one payable to Blackwood in order to assure and demonstrate Blackwood's authority to act for and bind Union in the negotiations and settlement.

The settlement agreement. The settlement negotiations were held November 25, 1947, in the office of Brown & Wells, Reno attorneys for Cowden and Haskell and also attorneys for Dachner. Present were both Brown and Wells, Blackwood and Morgali. An agreement was reached for settlement in the sum of \$20,235, being more than \$4,000 less than the amount sought by the action. According to the affidavits and testimony of Brown and Wells as given before the trial court on motion to dismiss, in consideration of the settlement at that figure it was agreed by Blackwood that the Dachner action likewise be deemed settled for the sums secured on execution.

The settlement carried through. The following day Morgali returned to the office of Brown & Wells to carry out the terms of the settlement. He presented the Blackwood check and a second check for the balance, \$4,235. He received the production certificates and stock certificates of Cowden and Haskell. A telephone call was then placed by Brown to W. E. Baldy, Union's secretary, member of its board of directors and attorney, in Carson City, Nevada, advising Baldy that the pending appeal from the Dachner judgment was to be dismissed. Baldy confirmed the fact that the settlement agreement included settlement of the Dachner action by checking with Blackwood. O. M. Floe, a third member of Union's board of directors, was also consulted and approved the settlement and dismissal. Baldy then dismissed the appeal. Cowden and

Haskell then dismissed their action with prejudice and their attachment was released.

Reinstatement of the appeal. In the Dachner action, Union had been represented by three attorneys: Baldy, Wm. S. Boyle of Reno, and Robert E. Berry of Virginia City, with Boyle acting as senior counsel. During the events so far related, Boyle had been seriously ill, had been hospitalized and was then convalescing at his home. He had written Union asking to be relieved of his duties as counsel. A copy of this letter had been received by Baldy at the time he was instructed to dismiss the appeal. Dismissal of the appeal, however, was directly contrary to Boyle's previous advice to Union. On hearing of the action taken, Boyle summoned a majority of Union's officers and board members who thereupon, amongst themselves, repudiated the dismissal (Baldy and Floe reversing themselves in this regard), repudiated Blackwood's action in including settlement of the Dachner action as consideration for settlement of the Cowden-Haskell action against Imperial, and instructed Boyle to move this court for reinstatement of the appeal. No demand ever was made of Cowden or Haskell for return of the money paid. No tender back of the production certificates or stock certificates ever was made. Boyle again became active as senior counsel for Union and the motion for reinstatement was filed and duly made to this court. In affidavits filed in opposition to the motion, the contended settlement of the action was disclosed. It was not, however, argued to this court. The question

presented by the motion was not whether grounds for dismissal existed. The sole question was whether an authorized dismissal had in fact been accomplished. This court ordered reinstatement of the appeal. In doing so, however, it clearly did not decide that grounds for dismissal did not exist. The order for reinstatement stated: "Without passing upon the general proposition of law as to the authority of junior counsel to dismiss an appeal contrary to the wishes of senior counsel [which this court recognized to be the issue confronting it] * * * we are of the opinion that the reinstatement of the appeal will result in less danger of injustice to the parties." No reference whatsoever was made to the contended settlement.

So much for the factual background.

Union's first contention is that the record demonstrates lack of authority in Blackwood to bind Union by his settlement of the Dachner action. Union emphasizes in this regard that his acts were taken without the formal sanction of Union's board of directors. It does not appear, however, that any formal board action whatsoever was taken prior to the settlement conference. If Blackwood was without actual formal authority to settle as he did, he was likewise without actual formal authority to settle in any manner whatsoever. The fixing of any limits upon his authority by formal board action was done, if at all, by way of partial ratification and wholly after the fact.

With reference to his authority, the trial court in dismissing the action below apparently proceeded

upon the theory of ostensible authority and specifically found as follows: "The Court finds that the plaintiff herein and the Cowden-Haskell people did have legal reason to believe that Blackwood and Morgali and Baldy had the authority to enter into the agreement."

It cannot be denied that there is substantial evidence in the record to support this finding. Blackwood was armed with a cashier's check to his own order supplied by Union for the purposes of settlement. Morgali, Imperial's attorney, did not question Blackwood's authority to proceed as he did and thus gave indication (at least so far as Imperial was concerned) that he concurred in Blackwood's actions and that Blackwood was proceeding within the scope of his authority. Morgali testified before the trial court that he had conveyed to Brown and Wells the fact that Imperial desired to have all litigation cleared up so that they could get to mining; that he "was interested from Imperial's point of view in making a settlement so there would be no further litigation." Brown and Wells had every right to assume that both Imperial and Union were interested in disposing of the Dachner litigation. Certainly they could hardly be expected to possess greater knowledge than Morgali's as to Blackwood's actual authority, nor possess greater insight than his into the intentions of Union's officials. Their right to rely upon Blackwood's apparent authority is further strengthened by the fact that neither Baldy nor Floe questioned it until their conference with Boyle.

Even should there be question as to factual support for such a finding, however, it should be clear that Blackwood's conduct had not been properly repudiated and had, therefore, in effect been ratified by Union's failure to demand rescission of the entire agreement as unauthorized. To permit Union to ratify Blackwood's action in part only and to retain in whole the benefits thereof would be to permit it to rewrite the settlement agreement to suit itself.

That the contract, while in settlement of an action against Imperial, was for the benefit of Union cannot be denied. The trial court had before it the statement of Union's president, Somers, to such effect. The production certificates secured thereby were Union's obligations which Union was required to retire and upon consummation of the settlement, Union treated those obligations as no longer valid or outstanding. Union's stock interest in Imperial and its \$200,000 note both became enhanced in value by removal of the liens securing the obligations. It is clear that Union benefited from the settlement and retained the benefits thereof while purporting to repudiate the agreement in part. The settlement must then, be taken to have been ratified in whole. *Alexander vs. Winters*, 24 Nev. 143, 50 P. 798; *Federal Mining & Engineering Co. vs. Pollak*, 59 Nev. 145, 82 P.2d 1008; See: concurring opinion *Defanti vs. Allen Clark Co.*, 45 Nev. 120, 128, 198 P. 549, 552; *Restatement of the Law, Agency*, sec. 99.

In *Federal Mining & Engineering Co. vs. Pollak*, *supra*, this court quoted with approval from 2 *Fletcher Cyclopedia Corporations* as follows: "This

rule is based upon the doctrine of ratification in toto, under which a principal must either ratify the whole transaction or repudiate the whole. He cannot separate the transaction and ratify the part that is beneficial to him, repudiating the remainder; but if he, of his own election and with full knowledge, accepts and retains the benefits of an unauthorized transaction, he must also accept the part that is not beneficial, and will be held to have ratified the whole. In some states this rule is adopted by statute."

As the court there stated: "We have no such statute in this state, but in view of the decisions heretofore rendered by this court, the question as to the applicability of the rule to the facts of this case is not an open one in our jurisdiction."

Union next presses upon us the action of this court in reinstating the appeal as *res judicata* upon the question of settlement. As we have already pointed out, however, the order reinstating the appeal was not based upon lack of grounds for dismissal. This court was there concerned only with the question whether the appeal had properly been dismissed by one in authority.

True, if the action had become moot by virtue of the settlement, it was moot when this court handed down its opinion upon the judgment. Thus this court undoubtedly has been placed in the somewhat quixotic position of striving mightily to produce a futility. True, Dachner might have moved this court for dismissal of the appeal upon the ground of settlement and thus specifically directed the attention of the court to the moot status of the

matter. However, if the fact of settlement was not presented to the court as a basis for action, neither was it concealed from the court. Thus it can hardly be said that Dachner had abandoned or waived his contentions in relation thereto and his continuing with the appeal upon the merits cannot be said to have operated to nullify the settlement. *Mills County vs. Burlington & Missouri River Railroad Co.*, 107 U.S. 557, 27 L.Ed. 578, 2 S.Ct. 654 (in which case the Supreme Court of the United States found itself in a situation substantially identical to that confronting us). Under the circumstances it would ill benefit us to read into the order of reinstatement an effectiveness never intended and contrary to its express language for the sole purpose of breathing life into the controversy over which this court was then laboring.

The order of the trial court is affirmed with costs.

Badt, C. J., and Eather, J. concur.

Attest: This is a full, true and correct copy
Anna Legarza, Official Reporter.

Filed December 18, 1951. Ned A. Turner, Clerk
of Supreme Court.

Clerk's Certificate

State of Nevada—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of Supreme Court of said State of Nevada, do hereby certify that the attached is a true and

correct copy of the original opinion Case No. 3578, filed December 18, 1951. Union Lead Mining and Smelter Company, a Nevada Corporation, Appellant, vs. R. H. Dachner, Doing Business Under the Firm Name and Style of "Pacific Machinery & Engineering Company," Respondent.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 26th day of December, A. D. 1951.

[Seal] /s/ NED A. TURNER,

Clerk of Supreme Court of the
State of Nevada.

[Endorsed]: No. 13,765. United States Court of Appeals for the Ninth Circuit. G. L. Thompson, as Trustee in Bankruptcy of the Union Lead Mining and Smelter Company, bankrupt, Appellant, vs. R. H. Dachner, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 17, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,765

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, Bankrupt

G. L. THOMPSON, as Trustee in Bankruptcy of
Union Lead Mining and Smelter Company,
Bankrupt, Appellant,

vs.

R. H. DACHNER, Appellee.

APPELLANT'S DESIGNATION OF RECORD
FOR APPEAL

Appellant designates as material to his Appeal those portions of the record heretofore designated by him in Appellant's designation of record for Appeal filed in the United States District Court for the Northern District of California, Southern Division, on the 1st day of May, 1953.

Dated: July 21, 1953.

/s/ ALEX L. ARGUELLO,
Special Counsel for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 23, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD
FOR APPEAL

Appellee designates the following portions of the record as material to his appeal:

1. Appellee's exhibits.
2. Reporter's transcript of proceeding of July 26, 1951.
3. Certificate and Report of Referee dated March 12, 1952, specifically including "Referee's Notes", all of which were filed on September 24, 1952.

/s/ JASPER W. WEINBERGER,
/s/ HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Appellee.

[Endorsed]: Filed Aug. 3, 1953. Paul P. O'Brien,
Clerk.

No. 13,765

IN THE

United States Court of Appeals
For the Ninth Circuit

G. L. THOMPSON, as Trustee in Bankruptcy of the Union Lead Mining and Smelter Company, bankrupt,

Appellant,

VS.

R. H. DACHNER,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

BRIEF FOR APPELLANT.

ALEX L. ARGUELLO,

244 Kearny Street, San Francisco 8, California,

*Special Counsel for G. L. Thompson,
Trustee in Bankruptcy.*

FILED

NOV 20 1953

PAUL P. O'BRIEN
CLERK

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No. 13,765

IN THE

**United States Court of Appeals
For the Ninth Circuit**

G. L. THOMPSON, as Trustee in Bankruptcy of the Union Lead Mining and Smelter Company, bankrupt,

Appellant,

VS.

R. H. DACHNER,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Southern Division.**

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

A petition for ancillary administration in bankruptcy was filed in the United States District Court for the Northern District of California, Southern Division, pursuant to Section 20, Subdivision 2A(20) of the Bankruptcy Act, 11 U.S.C. 43. Said petition was referred to the Referee in Bankruptcy under Section 38(6) of the Bankruptcy Act, 11 U.S.C. 66.

The Referee in Bankruptcy issued a Rule to Show Cause for a Turn Over Order. Following hearing on

Rule to Show Cause, a Petition to Review was filed in the United States District Court for the Northern District of California, Southern Division, pursuant to Section 39(c) of the Bankruptcy Act, 11 U.S.C. 67.

Following affirmance of the decision of the Referee, this appeal was commenced in the Court of Appeals for the Ninth Circuit pursuant to Section 24, Subdivision (a) of the Bankruptcy Act, 11 U.S.C. 47.

STATEMENT OF THE CASE.

The factual situation which gives rise to the appeal before this Court is briefly as follows: On June 16, 1947, the Second Judicial District Court of the State of Nevada entered a judgment in favor of R. H. Dachner (R.T. 112), the appellee here, against the Union Lead Mining and Smelter Company, the appellant here. An appeal was taken from this judgment to the Nevada Supreme Court in July, 1947. While this appeal was pending, Dachner, on November 20, 1947, on the basis of his judgment successfully levied execution on the bank account of Union Lead Mining and Smelter Company, obtaining thereby the sum of twenty-six thousand two hundred sixty-six and 81/100 (\$26,266.81) dollars. (R.T. 115.) Thereafter, Union Lead Mining and Smelter Company, on February 7, 1948, filed a voluntary petition in bankruptcy and was adjudicated a bankrupt on February 9, 1948. (R.T. 27.) On June 25, 1948, the Nevada

Supreme Court reversed the judgment previously entered on behalf of Dachner and remanded the cause for a new trial as to all the issues of the case. (R.T. 117.) Subsequently, a judgment was again entered in favor of Dachner, which judgment was affirmed by the Supreme Court of Nevada. The parties to the proceedings in the Nevada courts were: R. H. Dachner, doing business under the firm name and style of Pacific Machinery and Engineering Company, Plaintiff, versus Union Lead Mining and Smelter Co., a Nevada corporation, Defendant. (R.T. 112.) On the 5th day of June, 1951, a Petition for Ancillary Administration in Bankruptcy was filed in the United States District Court, by G. L. Thompson as Trustee in Bankruptcy of Union Lead Mining and Smelter Co., Bankrupt. (R.T. 3.) Subsequent to this petition, an Order was entered by United States District Court that the matter be referred to the Referee in Bankruptcy and that R. H. Dachner show cause why he should not turn over to the trustee the sum of twenty-six thousand two hundred sixty-six and 81/100 (\$26,266.81) dollars. (R.T. 10.) The Referee in Bankruptcy found that the Court was without jurisdiction to proceed upon the petition filed by the Trustee in the above entitled District Court; that the petition be dismissed; and that the Order to Show Cause be discharged. (R.T. 38.) The Order of the Referee was confirmed by the District Court. (R.T. 49.)

QUESTION RAISED ON APPEAL.

The question raised on this appeal is:

Did the District Court have summary jurisdiction over the funds in the possession of R. H. Dachner so as to require the issuance of a Turn Over Order?

SPECIFICATION OF ERRORS.

The appellant assigns as error the following acts and omissions of the Referee in Bankruptcy and the District Court.

1. The Referee erred in failing to find that no appearance was made by the Trustee in any of the proceedings before the Courts of Nevada and that there was no order issued out of the Federal Court directing such appearance and that there was no order entered in either the bankruptcy or reorganization proceedings allowing the Dachner claim to be litigated in the State Courts.

2. The Referee erred in finding that R. H. Dachner did not have under his control any of the assets of the bankrupt subsequent to February 7, 1948; and in finding that no part of the assets of the bankrupt came into the actual or constructive possession of R. H. Dachner after the filing of the bankruptcy petition on February 7, 1948; and in failing to find that upon the reversal of the State Court judgment on June 25, 1948, upon which judgment execution had previously been levied by the said R. H. Dachner on November 20, 1947, in the sum of twenty-six thou-

sand two hundred sixty-six and 81/100 (\$26,266.81) dollars, that said sum of money instantly became an asset of the bankrupt and the said R. H. Dachner held it as constructive trustee.

3. The Referee erred in his Conclusion of Law No. 1 that said Court was without jurisdiction to proceed.

4. The Referee erred in his Conclusions of Law No. 2 and No. 3 to the effect that the petition should be dismissed and that the Order to Show Cause based thereon should be discharged.

5. The Referee erred by holding in effect that the State Court had the power, during the bankruptcy proceeding, to diminish the assets of the bankrupt estate by determining therein that a compromise had been effected by certain officers of the debtor, when the action was *in personam* and no appearance had been entered by the Trustee in Bankruptcy in the State Court proceedings, nor had the Trustee been directed to enter an appearance, nor had there been any order directing that the claim might be litigated in the State Court.

6. The Referee erred in failing to find that Dachner had in his possession the sum of twenty-six thousand two hundred sixty-six and 81/100 (\$26,266.81) dollars, the asset of the bankrupt, and in failing to overrule the objection to summary jurisdiction.

7. The honorable District Court erred in confirming the Order of the Referee in Bankruptcy entered on March 12, 1952.

ARGUMENT.**I.**

**THE CONCLUSION OF THE DISTRICT COURT AND THE REF-
EREE THAT THE COURT LACKED SUMMARY JURISDICTION
TO PROCEED ON THE RULE TO SHOW CAUSE WAS ER-
RONEOUS.**

The District Court had summary jurisdiction to issue a turn over order where the funds passed to the constructive possession of the Trustee in Bankruptcy for the Union Lead Mining and Smelter Company, in which case the claim of R. H. Dachner would not be adverse and substantial.

That the property passed to the constructive possession of the Trustee in Bankruptcy for Union Lead Mining and Smelter Company, and that thereafter R. H. Dachner held said property as a constructive trustee, is clear from the following legal principles and authorities.

1.

When a judgment is reversed and remanded for a new trial, the parties are returned to the status existing prior to the judgment.

“When a judgment is reversed it becomes, insofar as the parties to the action are concerned, the same as if it had never been rendered and the foundation of any proceeding which may have been had by way of execution thereunder is taken away. *Cowdery v. London & San Francisco Bank*, 139 Cal. 398, 73 P. 196, 96 Am.St.Rep. 115; *Bogga v. North American Bond, etc., Co. (Cal. Sup.)* 58 P. 2d 918; *Levy v. Drew*, 4 Cal. 2d 456 at page

459, 50 P. 2d 435; Caroy v. Dowdell, 131 Cal. 499, 63 P. 2d 780.”

First Trust Joint Stock Land Bank of Chicago v. Meredith, 64 P. 2d 977.

“When the order of the Supreme Court * * * was made, reversing the judgment of the court below, that judgment was forthwith vacated, *and until action was taken by the court below in pursuance of the mandate, to enter another judgment in accordance with the opinion of the Supreme Court, there was no judgment in existence in the case.*” (Italics ours.)

Cowdery v. London & San Francisco Bank, 139 Cal. 398, 73 P. 196.

In applying this principle to the facts of this case, it is apparent that when the judgment upon which the execution was issued was reversed by the Supreme Court of Nevada, on June 25, 1948, the foundation of the execution was swept away and the parties stood in the same position as though no judgment had been rendered. Consequently, as of this time, Dachner had in his possession funds of Union Lead Mining and Smelter Company. Since Union Lead Mining and Smelter Company was a bankrupt at that time, constructive possession of the funds passed by operation of law to the Bankruptcy Court.

2.

A party who has levied execution on a judgment that is subsequently reversed and remanded for a new trial, has the duty to make restitution to the other party. If restitution is not made he holds the property as a constructive trustee.

The Restatement of the Law of Restitution, Section 74, provides:

“Judgments Subsequently Reversed.

A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside unless restitution would be inequitable or the parties contract that payment is to be final. If the judgment is modified there is a right to restitution or the excess.”

Comment:

“* * * the fact that the judgment was merely set aside and that no final judgment was entered for the payor does not prevent restitution. If the Appellate Court vacates a judgment and orders a new trial, a person who has satisfied the judgment vacated is entitled to restitution. See Illustration 3.”

“3. A obtained a judgment against B for a thousand dollars. B paid the judgment. On appeal the judgment is set aside and a new trial ordered. In the absence of other facts, B is entitled to restitution from A.”

The view of the Restatement is supported by the cases. See:

Ex parte Walter Bros., 89 Ala. 237, 7 So. 400,
18 Am. St. Reports 103;

Levy v. Drew, 50 P. 2d 435, 101 A.L.R. 1147.

In *Levy v. Drew* (supra) the Supreme Court of the State of California set forth this doctrine as follows:

“It is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of all things taken from him under the judgment. After reversal, the respondent stands in the position of a trustee of appellant of the property obtained under the judgment. Restitution may be sought in the same or in an independent action.”

“We therefore conclude that defendant had no right to retain the money collected under the execution after the judgment upon which it was issued had been vacated.

“There remains for determination the question of defendant’s right to offset his claim for services rendered against the claim of the plaintiff for restitution of the money unlawfully held by defendant.

“The rule is consistently applied in the federal courts that when a debtor, prior to bankruptcy, voluntarily places in the hands of his creditor assets for the particular purpose of extinguishing a debt, and bankruptcy occurs, the creditor can offset his demand against the claim of the trustee in bankruptcy for a return of the assets to the bankrupt estate. It is equally well settled that the unauthorized possession of funds of the bankrupt can give the creditor no right to apply them to the payment of his own claim to the prejudice of the rights of other creditors. *Emerson v. Fisher* (C.C.A.) 246 F. 642; *Lehigh Valley Coal Sales Co. v. Maguire* (C.C.A.) 251 F. 581; *Alvord v.*

Ryan (C.C.A.) 212 F. 83; In re Interborough Consol. Corporation (C.C.A.) 288 F. 334, 32 A.L.R. 932; Parker State Bank v. Pennington (C.C.A.) 9 F. (2d) 116; Cook County Nat. v. United States, 107 U.S. 445, 2 S. Ct. 561, 27 L. Ed. 537; In re Gans & Klein (D.C.) 14 F. (2d) 116; Hanover Nat. Bank v. Suddath, 215 U.S. 122, 30 S. Ct. 63, 54 L. Ed. 120.

“In the instant case the money was not voluntarily paid to defendant by the corporation, but was forcibly seized by the levy of an execution, nor was it voluntarily handed over to be applied on the particular debt owed to defendant. *When his judgment was vacated, defendant’s possession of the money became illegal and he should have restored it to his debtor. It follows that defendant cannot offset the amount of his claim against the suit of the trustee in bankruptcy for the money which he unlawfully retained but must restore it and take his place among the general creditors of the bankrupt estate.*” (Italics ours.)

It stands without question that on June 25, 1948, on which date the Supreme Court of Nevada reversed and remanded the judgment upon which Dachner had seized the funds of the bankrupt, that thereafter Dachner’s possession of those funds became illegal. He was obligated, legally as well as morally, to restore the funds to the bankrupt and take his position with other general creditors of the bankrupt estate.

3.

Funds held by a constructive trustee are held without right or claim.

The Supreme Court of California, in *Bainbridge et al. v. Stoner et al.*, 106 P. 2d 423, in discussing the definition and underlying theory of constructive trusts, stated:

“The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person having acquired it through fraud, undue influence, breach of trust, or in any other improper manner and he is usually personally liable in damages for his acts. But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer, which might have to be shared with other creditors; he is given the right to a restoration of the property itself.”

Since the funds of the bankrupt were illegally held by Dachner, after the reversal of the judgment by which he obtained possession of them, he became a constructive trustee of the funds for the bankrupt. The trustee for the bankrupt was, therefore, immediately vested with the right and title to the funds and he could not be divested of his right to the funds by any *in personam* proceedings between Dachner and Union Lead Mining and Smelter Company, to which he was not a party. Therefore, the subsequent *in personam* proceedings in the Nevada Courts between Dachner and Union Lead Mining and Smelter Company would not divest the Trustee

in Bankruptcy for Union Lead Mining and Smelter Company of his constructive possession of said funds in the absence of his appearance in such subsequent proceedings.

In *Rhodes v. Elliston*, 29 F. 2d 737, claimant obtained a judgment in the State Court against the bankrupt for conversion of certain cotton bales. He subsequently offered to file a copy of this judgment as proof of claim against the bankrupt which offer was rejected even though suit had been commenced prior to bankruptcy and the trustee had been given notice of the action. On an appeal from this decision, the Court held:

“The judgment was a personal one against the bankrupt. It was not binding upon the bankrupt estate because the trustee was not made a party defendant. Under sec. 11(d) of the Bankruptcy Act, the exclusive power to order a trustee to defend a suit in a state court is vested in the bankruptcy court. It therefore was not error to refuse to accept the judgment of the state court as conclusive proof of the claim in question.”

Thus the subsequent proceedings in the Nevada Court could affect only the perfection of Dachner's claim and the right to take his position as a general creditor of the bankrupt upon the basis of judgment. It could not establish his right to any specific funds whether in his possession as constructive trustee or otherwise as to the Bankruptcy Court. See 10 Collier, Bankruptcy, page 964, wherein that proposition is set forth as follows:

“Where a petition has been filed against an alleged bankrupt another court has no right to seize, attach, fix a lien, or otherwise affect the bankrupt’s property by virtue of proceedings begun thereafter, unless with the consent of the bankruptcy court, regardless of whether or not actual possession has been taken by the bankruptcy court’s officers.”

CONCLUSION.

In view of the foregoing, it is respectfully urged that the judgment of the honorable District Court should be reversed and the matter be returned to the honorable District Court for issuance of a Turn-Over Order.

Dated, San Francisco, California,
November 13, 1953.

Respectfully submitted,

ALEX L. ARGUELLO,
Special Counsel for G. L. Thompson,
Trustee in Bankruptcy.

No. 13,765

IN THE
United States Court of Appeals
For the Ninth Circuit

In the Matter of

UNION LEAD MINING AND SMELTER
COMPANY,

Bankrupt.

G. L. THOMPSON, as Trustee in Bank-
ruptcy of Union Lead Mining and
Smelter Company, Bankrupt,

Appellant,

VS.

R. H. DACHNER,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Southern Division.**

BRIEF FOR APPELLEE.

CASPAR W. WEINBERGER,

HELLER, EHRMAN, WHITE & MCAULIFFE,

14 Montgomery Street, San Francisco 4, California,

Attorneys for Appellee.

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Appellant,

vs.

R. H. DACHNER,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

BRIEF FOR APPELLEE.

SUPPLEMENTAL STATEMENT OF THE CASE.

Appellee has no quarrel with the facts set forth in Appellant's opening brief. However, two additional facts should be borne in mind: (1) the Nevada trial court, after the reversal in the Nevada Supreme

Court, gave judgment in Appellee's favor for the second time, because the trial court found that the entire matter had been compromised and settled by an agreement under which Appellant was permitted to retain the amount he had secured on execution. Th trial court then dismissed the action, and this time the Nevada Supreme Court affirmed (63 Nev. 313, 239 Pac. 2d 248). This second opinion of the Nevada Supreme Court is set forth in full in the Record (R. 154-164).

It clearly appears from that second opinion of the Nevada Supreme Court that the second judgment in Appellee's favor was affirmed because the matter was fully settled and compromised by permitting him to retain the sum he had secured by executing on the first judgment in his favor (R. 155). It also clearly appears from that opinion that the bankrupt "benefited from the settlement and retained the benefits thereof while purporting to repudiate the agreement in part" (R. 162).

(2) Referee Wyman, after lengthy and thorough consideration, and after a full and accurate summary of the complicated factual statement of the whole controversy (R. 20-37), and a clear and accurate summary of the law involved (R. 41-48), held, in his order of March 12, 1952 (R. 38) that he lacked *summary* jurisdiction to hear the petition, and dismissed the petition.

The matter is here on Appellant's appeal from the order of the United States District Court (R. 49),

confirming the order of the Referee in Bankruptcy. That order dismissed Appellant's petition seeking a *summary* turn-over order on the ground that the District Court had no *summary* jurisdiction to grant the petition because Appellee's claim to the twenty-six odd thousand dollars involved was bona fide, substantial and adverse, and therefore the case could not be decided in a *summary* proceeding (See R. 44-45).

SUMMARY OF ARGUMENT.

The jurisdiction of the District Court to proceed summarily in this matter (which is the only issue on this appeal and the only issue in the case) depends solely on the question of whether or not Appellee's claim to retain the funds obtained from him on execution is adverse and bona fide, or whether his claim is merely colorable and frivolous.

The facts show that Appellee's claim to the funds involved (obtained on execution and retained by him as a result of a final judgment of the Nevada trial court in his favor, affirmed by the Nevada Supreme Court), is not only adverse, bona fide and substantial, but it is the *successful* claim, approved by the Nevada Courts. It is hard to conceive of a clearer case for the denial of summary jurisdiction.

ARGUMENT.

I.

THE BANKRUPTCY COURT HAS NO JURISDICTION TO ADJUDICATE, IN THIS SUMMARY PROCEEDING, THE ADVERSE, BONA FIDE AND SUBSTANTIAL CLAIM OF APPELLEE TO THE FUNDS HERE INVOLVED.

A. The applicable law.

The principles which govern the jurisdiction of the Court in this matter are familiar and well settled. In *Cline v. Kaplan*, 323 U.S. 97, 98, 65 S. Ct. 155, 89 L. Ed. 97, the Supreme Court said:

“A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. If the property is not in the court’s possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated ‘in suits of the ordinary character, with the rights and remedies incident thereto’.” (Citing cases.)

The Supreme Court also said in that case that:

“Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court.” (323 U.S. at page 99.)

Accord:

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 431-3, 44 S. Ct. 396, 68 L. Ed. 770;

In re California Paving Co., 95 F. Supp. 909,
 D. Ct. No. D. of Cal.; Aff'd. Memo. 193 F.
 2d 647, C. A. 9, Cert. Den. 343 U.S. 957;
In re Carburetor Co., 202 F. 2d 75, C. A. 2;
 Cert. Den. 345 U.S. 957, 73 S. Ct. 939, 97
 L. Ed. 849;
Stark v. Baltimore Soda Fountain Co., 185 F.
 2d 398, C. A. 4;
In re Kansas City Journal-Post Co., 144 F. 2d
 812, 813, C. A. 8.

See:

Atlanta Flooring & Insulation Co. v. Russell,
 146 F. 2d 884, 886, C. A. 5.

It is clear that the referee's order dismissing this proceeding was correctly based on these general principles (R. 44).

Therefore, the only real preliminary question is whether Appellee's claim to the money here involved is meritorious and adverse, or whether it is merely frivolous; if it is the former, then as the Supreme Court has held, Appellee "has the right to have the merits of his claim passed on in a plenary suit and not summarily" (*Cline v. Kaplan*, 323 U.S. 97, at page 99).

Appellant apparently recognizes these general principles summarized in *Cline v. Kaplan*, supra, but contends that Appellee's claim is not adverse and bona fide, but is merely colorable and frivolous.

Appellant has not cited any bankruptcy or Federal cases on the only point involved in this case. His

omission to do so is significant for it is clear from all the cases involving the question of whether the Bankruptcy Court has *summary* jurisdiction to issue a turn-over order (which is the only question before this Honorable Court) that such *summary* jurisdiction exists only where the property involved is in actual or constructive possession of the court.

Cline v. Kaplan, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97;

Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481, 60 S. Ct. 628, 84 L. Ed. 876;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432, 433, 44 S. Ct. 396, 68 L. Ed. 770;

Harrison v. Chamberlin, 271 U.S. 191, 195, 46 S. Ct. 467, 469, 70 L. Ed. 897, 899;

In re California Paving Co., 95 F. Supp. 909, D. Ct. No. D. of Cal., Aff'd. Memo, 193 F. 2d 647, C. A. 9, Cert. Den. 343 U.S. 957.

The facts demonstrate that the property is not in the *actual* possession of the Bankruptcy Court, and all of the authorities agree that property is not in the *constructive* possession of the Court, so as to give the Bankruptcy Court *summary* jurisdiction, where the property in question is held under an adverse, bona fide and substantial claim of right. It is only when a claim is frivolous or merely colorable that the property is said to be in the constructive possession of the court.

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 432, 433, 44 S. Ct. 396, 68 L. Ed. 770;

Harrison v. Chamberlin, 271 U.S. 191, 195,
46 S. Ct. 467, 469, 70 L. Ed. 897;
In re Kansas City Journal-Post Co., 144 F. 2d
812, 813, C. A. 8.

Appellant, because of his failure to cite or discuss any Federal bankruptcy cases dealing with the only question involved here has overlooked this crucial fact, that the property *cannot* be in the constructive possession of the Bankruptcy Court so as to give the summary jurisdiction he seeks to invoke, if Appellee's claim is adverse, bona fide and substantial.

Appellant's entire brief is devoted to a discussion of the merits, if any, of Appellant's position in the controversy itself. Appellant repeatedly asserts, without citing any authority, that "constructive possession of the funds passed by operation of law to the Bankruptcy Court (or to the Trustee) (Appellant's brief, pages 6, 7, 11). However, even a casual examination of the Federal bankruptcy cases cited by Appellee above will demonstrate that the Bankruptcy Court does not have the constructive possession necessary to give it summary jurisdiction if appellee's claim to retain the money "discloses a contested matter of right, involving some fair doubt and reasonable room for controversy . . . in matters either of fact or law."

Harrison v. Chamberlin, 271 U.S. 191, 195,
46 S. Ct. 467, 469, 70 L. Ed. 897, 900;
In re Kansas City Journal-Post Co., 144 F. 2d
812, 813, C. A. 8.

Furthermore, “where the jurisdictional allegation of possession is made and denied [as it is in our case] the party making the allegation has the burden of proving the challenged allegation and if it is not proved or admitted the Referee must dismiss the proceeding”. *Wauchner v. Goggin*, 175 F. 2d 261, 265-6, C. A. 9 (an excellent summary of the law on this subject citing and discussing the leading cases).

Accord: *Alt v. Burt*, 181 F. 2d 996, C. A. 6.

Consequently, the only inquiry left for this Honorable Court is whether or not Appellee’s claim to the money is adverse, bona fide and substantial, for if it is, the money is *not* in the constructive possession of the Bankruptcy Court, there is no *summary* jurisdiction, and the order of the District Court must be affirmed.

B. Appellee’s claim is adverse, bona fide and substantial.

The record discloses (R. 22) that Appellee recovered a judgment in the trial court and levied execution thereon nearly four months before the first petition in bankruptcy was filed.¹

Following levy of execution on the judgment, the Nevada Supreme Court reversed the judgment and remanded the matter for a new trial. When the mandate came down, the trial court in Nevada again considered the case and found that the matter had been

¹It should be pointed out that counsel for Appellant at the hearing specifically waived any question involving a possible preference. (R. 64, 88.)

settled and compromised by an agreement which benefited the bankrupt (R. 162), and which provided that Appellee was entitled to retain the funds obtained by him on execution (R. 155, 158).

This second judgment of the Nevada trial court was affirmed by the Supreme Court of the State of Nevada (R. 154-164). Appellant is quite willing to use the Nevada State Court proceedings after the bankruptcy as long as the results were favorable to him, but after the first Nevada Supreme Court reversal, he refuses to recognize the subsequent Nevada proceedings which resulted in the holding favorable to Appellee.

Appellant's position is that because there was a reversal, Appellee is bound to restore the funds obtained by him on execution, and that *any contention by Appellee to the contrary is not adverse, substantial or bona fide but is merely colorable and frivolous*. Appellant insists that when a judgment is reversed, the party who won in the trial court and lost in the Appellate Court must *in all cases* make restitution to his opponent.

This, however, is not the law, as is demonstrated by the authorities cited by Appellant himself.

Section 74 of the Restatement of Restitution expressly states that restitution is proper in such a case "*unless restitution would be inequitable or the parties contract that payment is to be final*". The comment under paragraph c. illustrates this further by stating that "thus restitution may be denied to

the extent that the payor (the bankrupt here) admits the money to be due *or where subsequent to the judgment events have occurred which entitle the payee to th amount paid*". (Emphasis supplied.)

California is in full accord with the Restatement that "the exercise of power to restore benefits after reversal has been declared to be discretionary" and benefits are restored after reversal only "where justice requires it". *Schubert v. Bates*, 30 Cal. 2d 785, 790-91.

It is therefore apparent that Appellant's entire argument on this point merely states Appellant's belief that his claim is superior to Appellee's claim on the merits.

Appellant has not contended, and indeed he cannot contend in this *summary* proceeding, that Appellee's claim to retain the funds, which claim has been upheld by the Nevada trial court and affirmed by the Nevada Supreme Court, is frivolous and merely colorable.

There are many cases where restitution is not required after the first reversal, and the Nevada Supreme Court has held that Appellee's claim to retain these funds is such a case.

How, in the face of such a decision, can Appellant characterize Appellee's claim as merely frivolous and colorable?

Finally, Appellant's argument that the Nevada State Court proceedings cannot bind him, does not

confer *summary* jurisdiction on the Bankruptcy Court. It is an argument which goes only to the merits of the case and not to the question of whether or not Appellee's claim is substantial, adverse and bona fide. Furthermore, even on the merits, this question has already been found against petitioner, and the attention of this Honorable Court is respectfully directed to the full and very able discussion of this point in Referee's Note 1 (R. 41-44) in which summary the Referee concluded that:

"It appears, from the facts and circumstances present herein, that the trustee in bankruptcy, *with knowledge of the action pending, in the Nevada courts, wherein the bankrupt and Dachner, the respondent herein, were involved* (even to the extent of availing himself of the use of the rulings therein, so long as such rulings seemingly worked to his advantage, as such trustee), stood silently aloof and did nothing whatsoever, either to see to it that he (as such trustee) became an active participant in such state court proceedings, or that the courts of Nevada, if possible, should be made to cease and desist their activities, in connection with the bankrupt and Dachner, until the primary bankruptcy court had dealt with the rights of the bankrupt and/or trustee and Dachner." (R. 42.) (Emphasis supplied.)

CONCLUSION.

All of the arguments and cases cited in Appellant's brief appeared in the two briefs submitted by him to the Referee and in the briefs and oral arguments

submitted to the United States District Court. These arguments and authorities do not, and cannot, meet Appellee's contention that his claim to retain the funds received by him on execution, is, at the very least, substantial, adverse and bona fide, for as Referee Wyman found (R. 44) "There could be no clearer case of a bona fide claim to the money in controversy than that shown by the record herein."

Therefore, the order of the District Court, confirming the order of dismissal entered by the Referee, should be affirmed.

Dated, San Francisco, California,
December 21, 1953.

Respectfully submitted,
CASPAR W. WEINBERGER,
HELLER, EHRMAN, WHITE & MCAULIFFE,
Attorneys for Appellee.

No. 13,765

IN THE
United States Court of Appeals
For the Ninth Circuit

In the Matter of

UNION LEAD MINING AND SMELTER
COMPANY,

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G. L. THOMPSON, as Trustee in Bank-
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Appellant,

VS.

R. H. DACHNER,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

ALEX L. ARGUELLO,

244 Kearny Street, San Francisco 8, California,

Special Counsel for G. L. Thompson,
Trustee in Bankruptcy.

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Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

Appellant herewith submits his closing brief in
reply to several erroneous contentions made by the
appellee.

I.

**THE DISTRICT COURT IN BANKRUPTCY, HAVING ACTUAL OR
CONSTRUCTIVE POSSESSION, HAS SUMMARY JURISDIC-
TION TO DETERMINE ADVERSE CLAIMS TO PROPERTY.**

Appellee's claim that the Bankruptcy Court was without summary jurisdiction is based upon two erroneous contentions: (1) that the only real preliminary question is whether appellee's claim to the money involved here is meritorious and adverse, and (2) that property cannot be in the constructive possession of the Court if the claim is adverse. (Brief for Appellee, p. 6, et seq.)

That both of these contentions are faulty is evident from a consideration of the cases cited by appellee and the authorities cited herein:

Appellee argues:

"It is only when a claim is frivolous or merely colorable that the property is said to be in the constructive possession of the Court."

Appellee's Brief, p. 6.

and again:

"However, even a casual examination of the Federal Bankruptcy cases cited by Appellee above will demonstrate that the Bankruptcy Court does not have the constructive possession necessary to give it summary jurisdiction if Appellee's claim to retain the money 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy * * * in matters either of fact or law'."

The cases do not so hold. The unchallenged rule is:

The District Court in Bankruptcy, having actual or constructive possession, has summary jurisdiction to determine adverse claims to property.

Autin v. Piske, 24 F. 2d 626, certiorari denied 48 S. Ct. 562, 277 U.S. 601, 72 L. Ed. 1009;

White v. Barnard, 29 F. 2d 510, affirming, D.C.,

In re White, 25 F. 2d 341, certiorari denied

White v. Barnard, 49 S. Ct. 346, 279 U.S. 848, 73 L. Ed. 992;

Mitchell v. Mitchell, 59 F. 2d 62;

Central Republic Bank & Trust Co. v. Coldwell, 58 F. 2d 721;

In re American Cork Industries, 54 F. 2d 740;

In re Display State Lighting Co., 56 F. 2d 1046;

In re Scranton Knitting Mills, 21 F. Supp. 227.

In *Autin v. Piske*, supra, the Court stated:

“The bankruptcy court has jurisdiction of a suit by the trustee to recover property of the bankrupt in the hands of third persons * * * and may exercise this jurisdiction in a summary manner through the referee, if there is no adverse claim by the said third person, or such claim is merely colorable on the disputed facts. *Muller v. Nugent*, 184 U.S. 1, 22 S. Ct. 269, 46 L. Ed. 405; *Harrison v. Chamberlin*, 271 U.S. 191, 46 S. Ct. 467, 70 L. Ed. 897. *And, if the property is actually or constructively in the custody of the Court, this jurisdiction may be exercised, regardless of the character of the adverse claim. Whitney v. Winman*, 198 U.S. 539, 25 S. Ct. 778, 49 L. Ed. 1157; *Taubel, etc., Co. v. Fox*, 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770.” (Italics ours.)

In *Irvy v. Corey*, 95 F. 2d 963, the Court said:

“If the claim is real and adverse, and the res is not within the actual or constructive possession of the bankruptcy court, it is without power to adjudicate the invalidity of such claim, except in plenary proceedings.”

The Supreme Court of the United States in *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770, said:

“Whenever the bankruptcy court had possession, it could, under the act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision ‘e’ of section 67, under subdivision ‘b’ of section 60 and under subdivision ‘e’ of section 70. But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim.”

Accord:

Cline v. Kaplan, 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed.

(See opening quote appellee’s brief, p. 4.)

That constructive possession is sufficient to visit summary jurisdiction in the Bankruptcy Court. The Supreme Court of the United States in *Taubel-Scott-Kitzmiller Co. v. Fox*, *supra*, stated the proposition as follows:

“The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient.”

It is therefore apparent that summary jurisdiction exists in the Bankruptcy Courts if (1) The claim is not adverse and substantial, or (2) If the property passed to the constructive possession of the Bankruptcy Court; either by itself, is sufficient to vest summary jurisdiction in that court.

That the property was in the constructive possession of the court was demonstrated in appellant's opening brief. Appellee's sole argument in opposition to the principles offered by appellant is that constructive possession cannot exist where the property is held under an adverse claim. That this is an erroneous concept has been demonstrated.

II.

APPELLEE'S CLAIM IS NOT ADVERSE.

As to the contention of appellee that his claim is adverse, bona fide and substantial, he does not favor this Court with any authority to support the assertion.

He merely advances the novel theory that:

“Appellant is quite willing to use the Nevada State Court proceedings after the Bankruptcy as long as the results were favorable to him, but after the first Nevada Supreme Court reversal, he refuses to recognize the subsequent Nevada pro-

ceedings which resulted in the holding favorable to Appellee.”

Nothing could be further from the truth. It is not a question of accepting and rejecting, but rather, it is a question of the legal effect of the original reversal and the legal effect of the subsequent actions of that Court. Certainly, the Nevada Court had the power and jurisdiction to reverse a judgment and, when it did, the legal effect of its action was to restore the parties to the status quo—thus placing the funds seized in the constructive possession of the Bankruptcy Court. Those Courts, thereafter, in an impersonam action, could not bind the appellant. They were even without power to determine that he had a good claim.

4 Collier on Bankruptcy 964;

Pepper v. Litten, 308 U.S. 295, 60 S. Ct. 238;

U. S. Fidelity & Guarantee Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055.

Appellee then insists that it is the position of appellant that when a judgment is reversed the party who won in the trial Court and lost in the Appellate Court must, in all cases, make restitution to his opponent. Appellant does not so contend. It is appellant's contention however that appellee, in this case, must, under accepted principles of law, make restitution to appellant.

Appellee does not deny that under general principles, restitution must be made, but rather contends that a party need not make restitution in all cases. In other words, he admits the rule but says he is within

the exception to the rule. Specifically, he sets up the exception enunciated by the Restatement on Restitution, section 74:

“1. Unless restitution would be inequitable or the parties contract, that payment is to be final.”

As for the first part of this exception, the shoe is on the other foot. It would be inequitable if restitution were not made as restitution would benefit all creditors, including appellee rather than to permit one to benefit to the exclusion of others. But, aside from this concept, the factual situation here does not fit within the scope of the exception. Witness the Restatement in section 74(c):

“*When restitution is inequitable:* The creditor cannot normally obtain an advantage from having secured a judgment which is subsequently reversed so that, in the absence of special circumstances, it is not a defense that the claim which was the basis of the action can now be proved. Nor is restitution denied because the payor had a moral duty to make the payment. Nor is change of position a defense to the creditor.”

Likewise in Sec. 74(o): “Rights of other creditors of execution debtor.”

“Upon the reversal of a judgment, the defeated judgment creditor obtains no rights because of the judgment or execution, but is relegated to the position he occupied before the judgment. He therefore gains no priority over other creditors of the debtor by virtue of the judgment either as to the subject matter of the action or as to money paid.”

As far as the second proposition is concerned namely, "or the parties contract that payment is to be final," it cannot seriously be contended that this exception is available. How can a bankrupt make such a contract after bankruptcy: Here such a contract would have had to be made some time after June 25, 1948 (date of reversal)—some five (5) months subsequent to adjudication in bankruptcy. (February 9, 1948—date of adjudication as a bankrupt.) It is apparent that this exception is not applicable.

Appellee asserts that California cases are in full accord with these exceptions and cites *Schubert v. Bates*, 30 Cal. 2d 785, in support thereof. Examination of that case indicates that it supports the points set forth by the appellant in their entirety.

There, petitioners brought suit as plaintiffs, in an unlawful detainer action. They had received a certificate of eviction from OPA, subsequent to which notice to quit was served on defendants. Judgment was rendered in favor of petitioners and defendants vacated the premises. Petitioners then took possession of the property and sold it. Defendants filed an appeal and the judgment was reversed. Petitioners then filed a motion to dismiss and on the same day defendants filed a motion for restoration of possession. Defendants' motion was granted from petitioners sought certiorari.

The Supreme Court of California affirmed the order of restitution stating:

"In other words, while the plaintiff has the right to dismiss the action before trial, where no counterclaim or request for affirmative relief has

been filed that right, after a trial and reversal of the judgment, is subject to the right of the defendant to restoration of benefits lost by virtue of the erroneous judgment. The court has inherent power to enforce that, unaffected by the right of the plaintiff to dismiss the action. The existence of the power to restore benefits after reversal flows from the rule that upon reversal the action is as though it had never been tried and the court will, where justice requires it, place the parties as nearly as may be in the condition in which they stood previously.”

That this case is of no assistance to appellee is obvious, it, as well as the many cases cited by the appellant impose the burden of making restitution where a judgment has been reversed and remanded for a new trial.

CONCLUSION.

For the reasons stated in this reply, as well as those set forth in our opening brief, it is respectfully submitted that the judgment of the Honorable District Court should be reversed and the matter be returned to the Honorable District Court for issuance of a turnover order.

Dated, San Francisco, California,
January 11, 1954.

Respectfully submitted,

ALEX L. ARGUELLO,
Special Counsel for G. L. Thompson,
Trustee in Bankruptcy.

No. 13768

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WASHINGTON - OREGON SHINGLE WEAVERS' DISTRICT COUNCIL and EVERETT LOCAL 2580 SHINGLE WEAVERS UNION,
Respondents.

Transcript of Record

Petition for Enforcement of Order of the National
Labor Relations Board

FILED

AUG 5 1953

PAUL F. O'BRIEN
CLERK

No. 13768

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Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-A

(Received in Evidence March 24, 52)

Form NLRB-508 (1-51)

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

Case No. 19-CC-42. Date filed 2-6-52. Compliance
Status Checked by RM.

Important—Read Carefully: Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and three copies of this charge, and an additional copy for each organization, each local and each individual named in Item 1 with the NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor Organization or Its Agents Against Which Charge Is Brought: Washington-Oregon Shingle Weavers' District Council. Chartered by the United Brotherhood of Carpenters and Joiners of America. Affiliated with the American Federation of Labor, Eitel Building, Seattle, Washington.

General Counsel's Exhibit No. 1-A—(Continued)

The above-named organization or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b), subsection 4(A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

Above named union is inducing the employees of the employer to engage in a concerted refusal in the course of their employment to process or otherwise handle or work on shingles manufactured in the Dominion of Canada with the object of forcing the employer to cease using, handling or otherwise dealing in shingles of Canadian manufacture, owned by a Canadian corporation and to cease doing business with Canadian manufacturers.

Employer has entered into a long-term contract with the North Shore Shingle Co., Ltd., of Vancouver, British Columbia, to groove shingles manufactured in Canada and under contract of sale by the Canadian company to American firms. The first car of Canadian shingles arrived at Marysville, Washington, January 11, 1952, via the Great Northern Railroad in continuous transit from Vancouver, B. C., for processing by employer. Acting on orders from Arthur Brown, President of said union, not to process these Canadian shingles, the employees refused and continue to refuse to process said shingles, or any other shingles manufactured in the Dominion of Canada.

General Counsel's Exhibit No. 1-A—(Continued)

3. Name of Employer: John E. Martin and Frank S. Barker, co-partners doing business as Sound Shingle Co.

4. Location of Plant Involved: Delta Street, Marysville, Washington.

5. Nature of Employer's Business: Shingle manufacturing and shingle grooving.

6. No. of Workers Employed: Thirty-two (32).

7. Full Name of Party Filing Charge: John E. Martin.

8. Address of Party Filing Charge: Sound Shingle Company, Delta St., Marysville, Washington. Tel. No. Marysville 2102.

9. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

SOUND SHINGLE CO.,

/s/ By JOHN E. MARTIN,

(Signature of representative or person making charge)

Date: February 5, 1952.

GENERAL COUNSEL'S EXHIBIT No. 1-C

(Received in Evidence March 24, 1952)

Form NLRB-508 (1-49)

United States of America
National Labor Relations Board

AMENDED CHARGE AGAINST LABOR
ORGANIZATION OR ITS AGENTS

Case No. 19-CC-42. Date filed 2-6-52; 1st Amended
4-4-52.

Important—Read Carefully: Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and four copies of this charge with the NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor organization or its agents against which charge is brought: Washington - Oregon Shingle Weavers' District Council. Chartered by the United Brotherhood of Carpenters and Joiners of America. Affiliated with the American Federation of Labor; Everett Local 2580 Shingle Weavers Union, United Brotherhood of Carpenters and Joiners of America,

General Counsel's Exhibit No. 1-C—(Continued)

A. F. of L. District Council: Eitel Building, Seattle, Washington. Local: Labor Temple, Everett, Washington.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) Subsection 4(A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

Above named union is inducing the employees of the employer to engage in a concerted refusal in the course of their employment to process or otherwise handle or work on shingles manufactured in the Dominion of Canada with the object of forcing the employer to cease using, handling or otherwise dealing in shingles of Canadian manufacture, owned by a Canadian corporation and to cease doing business with Canadian manufacturers.

Employer has entered into a long-term contract with the North Shore Shingle Co., Ltd., of Vancouver, British Columbia, to groove shingles manufactured in Canada and under contract of sale by the Canadian company to American firms. The first car of Canadian shingles arrived at Marysville, Washington, January 11, 1952 via the Great Northern Railroad in continuous transit from Vancouver, B. C., for processing by employer. Acting on orders

General Counsel's Exhibit No. 1-C—(Continued)
from Arthur Brown, President of said union, not to process these Canadian shingles, the employees refused and continue to refuse to process said shingles, or any other shingles manufactured in the Dominion of Canada.

3. Name of employer: John E. Martin and Frank S. Barker, co-partners doing business as Sound Shingle Co.

4. Location of plant involved: Delta Street, Marysville, Washington.

5. Nature of employer's business: Shingle manufacturing and shingle grooving.

6. No. of workers employed: Thirty-two (32).

7. Full name of party filing charge: John E. Martin.

8. Address of party filing charge: Sound Shingle Company, Delta St., Marysville, Washington. Tel. No. Marysville 2102.

9. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

SOUND SHINGLE CO.,

/s/ By JOHN E. MARTIN,

Partner

Date: February 5, 1952.

GENERAL COUNSEL'S EXHIBIT No. 1-F
(Received in Evidence March 24, 1952)

United States of America
Before the National Labor Relations Board
Nineteenth Region
Case No. 19-CC-42

In the Matter of WASHINGTON - OREGON
SHINGLE WEAVERS' DISTRICT COUN-
CIL, CHARTERED BY THE UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFFILIATED
WITH THE AMERICAN FEDERATION
OF LABOR; EVERETT LOCAL No. 2580
SHINGLE WEAVERS UNION, UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, A. F. of L., and
JOHN E. MARTIN and FRANK S. BARKER,
Co-partners d/b/a SOUND SHINGLE CO.

COMPLAINT

It having been charged by John E. Martin and Frank S. Barker, Co-partners doing business as Sound Shingle Co., that Washington-Oregon Shingle Weavers' District Council, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, and Everett Local 2580 Shingle Weavers Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L., have engaged in, and are now engaging in, certain unfair labor practices affecting commerce as defined in the Labor-Management Re-

General Counsel's Exhibit No. 1-F—(Continued)
lations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Nineteenth Region of the Board, acting pursuant to the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

John E. Martin and Frank S. Barker, herein jointly called the Company, are, and at all times herein alleged were, Co-partners doing business as Sound Shingle Co., engaged at Marysville, Washington, in the business of manufacturing and processing shingles and shakes.

II.

The Company, in the course and conduct of its business, and at all times herein alleged, continuously has purchased materials, supplies, and equipment valued in excess of \$250,000, and continuously has manufactured, processed, and then shipped from its plant to states and territories of the United States other than the State of Washington, products valued in excess of \$25,000, annually.

III.

Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers Union, both affiliated with the United Brotherhood of Carpenters and Joiners of America and with the American Federation of Labor, herein jointly called the Respondents, are, and at all times alleged were,

General Counsel's Exhibit No. 1-F—(Continued)
labor organizations as defined in Section 2 (5) of
the Act.

IV.

The North Shore Shingle Company, Ltd., herein called North Shore, is a Canadian corporation located in Vancouver, British Columbia, Canada, where it is engaged in the manufacture and sale of shingles.

V.

Since on or about January 11, 1952, the Respondents, and each of them, by their agents, have engaged in, and by orders, directions, instructions, threats, appeals, and other means, have induced and encouraged employees of the Company to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services for their employer, an object thereof being to force or require the Company to cease using, handling, or otherwise dealing in the products of North Shore and/or other Canadian manufacturers or processors of shingles and to cease doing business with North Shore and/or other Canadian manufacturers and processors of shingles.

VI.

By all the acts of the Respondents, as set forth and described in paragraph V, above, and by each of them, the Respondents, and each of them, have engaged in, and are now engaging in, unfair labor practices within the meaning of Section 8, subsection (b) (4) (A) of the Act.

General Counsel's Exhibit No. 1-F—(Continued)

VII.

The activities of the Respondents, and each of them, as set forth and described in paragraph V, above, occurring in connection with the operations of the Company, as described in paragraphs I and II, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VIII.

The aforesaid acts of the Respondents, and each of them, as set forth and described in paragraph V, above, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsection (b) (4) (A) and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 9th day of April, 1952, issues this Complaint against Washington-Oregon Shingle Weavers' District Council, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, and Everett Local 2580 Shingle Weavers Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L., the Respondents herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19.

GENERAL COUNSEL'S EXHIBIT No. 1-H

(Received in Evidence March 24, 1952)

[Title of Board and Cause.]

ANSWER

Comes now Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers Union, chartered by the United Brotherhood of Carpenters and Joiners of America, A. F. of L. and in answer of the Complaint filed herein admit, deny and represent as follows:

I.

These answering respondents have no information sufficient upon which to form a belief with respect to the matter alleged in Paragraphs 1, 2 and 4 of the Complaint, and therefore denies the same.

II.

These answering respondents admit Paragraph 3 of the Complaint.

III.

These answering respondents deny Paragraphs 5, 6, 7 and 8 of the Complaint.

Wherefore, having answered, these respondents move the Board for an order dismissing the Complaint herein.

/s/ FRANCIS X. WARD,

General Counsel, United Brotherhood of Carpenters
and Joiners of America.

/s/ GEORGE E. FLOOD,

WETTRICK, FLOOD & O'BRIEN

GENERAL COUNSEL'S EXHIBIT No. 2

(Received in Evidence March 24, 1952)

"The Shingle Weaver"

March, 1950

CONVENTION REPORTS

By O. M. Sarrett

The shingle business looks a lot better now as compared to a year ago. We have been very successful in eliminating non-union shingles and shakes from the California market. This does not mean that all unfair Canadian or other non-union material has been eliminated; however it is safe to say that most of the shakes and shingles now used in California bear the Carpenters Union label.

As most of our Redwood mills were down, I think we should do everything possible to help them get started again. It seems to me, two things that would help bring this about would be to first amend Article X, Section Q of our Working Agreement, which places a penalty of about thirty cents a square on the manufacture of Redwood shingles. Next we should use every means possible to eliminate the unfair discrimination in many building codes, which specify the use of red cedar shingles. In my estimation these codes should specify wood shingles; thereby not depriving the Redwood mills of their normal market.

During the recent sharp upturn in the shingle market there have been shortages in some sections of California. In Los Angeles and the San Francisco Bay area the Shinglers' Unions have had to let a

General Counsel's Exhibit No. 2—(Continued)
few carloads of the Canadian shingles come in.

Had the building codes specified wood shingles instead of red cedar or certigrade red cedar shingles this would not have happened. However, Brother Earl Thomas, secretary of the Los Angeles District Council has informed me that he is keeping track of what few carloads do come in, and as soon as enough union labeled material is available the unfair Canadian stuff will be stopped. This is also true with John Barbour, business agent of newly formed Shinglers' Local 3111 in San Mateo, who is not only stopping non-union shingles but is trying to help us organize our heavy shake mills. This means a lot to us as some the largest building projects in California are in this district.

In Sacramento where wood shingles are used almost exclusively I find the carpenters are demanding their union label on practically all shingles and shakes used. This city uses more shingles for its size than any city on the Pacific Coast. Brothers Vic La Chappelle and John Nelson deserve a lot of thanks from us.

Brother George Blaker, business agent for Shingles' Local 478 in Oakland has always been on the look-out for non-union shingles and shakes. His favorite expression is "I keep Oakland and Alameda County Clean."

In Bakersfield, Santa Barbara and most cities of any size in California we have had very good cooperation; however there are a few places that are not so good. Among these are Fresno, Stockton, San

General Counsel's Exhibit No. 2—(Continued)
Diego, Santa Rosa and Petaluma. It seems the farming sections of the state give us the most trouble. These sections do not use many shingles, however.

California is the number one shingle market in the United States. If we keep non-union shingles out of California we can keep a market for our small mills that have no drying facilities and therefore cannot ship any great distance.

In July I called on several business agents in Nevada and Utah. They all promised to remind the union carpenters to look for the label.

I won't repeat my report on Texas, Oklahoma, New Mexico, Kansas, Colorado and Arizona. If any of you did not see this in the "Shingle Weaver" I have a copy available.

Most carpenter locals in Oregon are cooperating in our Union Label drive, although in Portland some of the business agents are not doing anything to help us so far. Brother Clell Harris, Lloyd Goodwin, Albert Hensley and several others have been very cooperative. Especially Brother Harris who has gone out of his way to help us. He has mailed letters to all dealers in this area requesting them to use shingles and shakes bearing the carpenters' union label and reminding them that Canadian shingles and shakes are unfair. He has also sent notices to each carpenter reminding him of his obligation to demand the union label when same can be had. He deserves a lot of credit and thanks from our organization.

More side wall shakes are used in Portland than

General Counsel's Exhibit No. 2—(Continued)

any place on the Pacific Coast and most of them are unfair Canadian. I have visited many projects in this area and talked with men on the job, also foremen and contractors. Most of these men did not know we had shakes bearing the carpenters' union label and they promise to demand the same on all shingles and shakes they used in the future. Many of them had a supply of non-union material on hand that had to be used up.

Brother C. B. Bridger of Astoria District Council of Carpenters has given us the finest kind of support in our union label drive. He sent letters to about 40 dealers under his jurisdiction asking their cooperation, also sending each dealer a list of our union mills.

Vancouver and Longview, Washington have not given us anything but promises so far. A lot of side wall shakes are used in these districts, most of which are "Olympic" brand. Bro. Beagle and myself first called on the carpenters' business agent at Longview about two months ago. At that time he promised to do everything he could to help eliminate these non-union shakes, but did nothing. I have called on him three times since; the last time I was accompanied by Brothers Arthur Brown and Charles Templar. He promised us he would get a letter out immediately to the Olympic Shake Co., Seattle, reminding them that his union was demanding the carpenter's label.

Brother C. D. Long, business representative at Klamath Falls and Brother R. P. Watson, business

General Counsel's Exhibit No. 2—(Continued)
representative of Central Oregon District council which includes Bend, Redmond, Madras, Prineville, John Day, Hood River and The Dalles, have also sent out notices to the dealers in their jurisdiction, requesting them to cooperate in the use of unfair shakes and shingles.

Although we may be successful in driving unfair Canadian shingles and shakes from the Western States they are still shipping hundreds of carloads to the Middle West and Eastern states. This is evident by the fact that Mr. Martin of Perma Products Company, Chehalis, Wash., has shown Brothers Brown, Templar and myself proof that he had shipped 40 carloads of Canadian shingles and shakes to the Eastern states, in the month of December alone. He is one of the many that are doing the same thing. He is now operating an unfair shake mill in Chehalis, running long hours, Sundays and holidays and is paying low wages in competition to our fair shake mills. He is also buying all of the unfair 18-inch Canadian shingles he can get at 35 cents per square below the American price and shipping them back East to be remanufactured by scab labor. How can our fair shake mills compete against a situation of this kind. According to our success so far on the Pacific Coast I think that in time we could force the use of the Carpenters Union Label on most shingles and shakes used in the United States.

I have received the finest kind of cooperation from Brothers Bill Crouch, Al Kuschke, Chet Shin-

General Counsel's Exhibit No. 2—(Continued)
ninger, Wayne Duval, of the Portland Local; also
from Brother Beagle of the Kalama Local.

Brothers Arthur Brown and Charles Templar
have done everything possible at all times to assist
me in any way they could.

GENERAL COUNSEL'S EXHIBIT No. 3

(Received in Evidence March 24, 1952.)

"Shingle Weaver"

[January, 1952.]

REPORT BY ART BROWN

President of Wash.-Ore. Shingle Weavers

Dist. Council

Recent reports indicate that most operators have
paid the bonus, but some have not. Plenty of time
has been allowed for making it out and we see no
reason for further postponement. If you have not
collected your bonus for Feb., March, April and
May of 1951, do so or inform your local officers
or Council and we will try to help in securing same
for you. On Dec. 15 the Ladies Auxiliary of the
Everett Local gave a wonderful turkey dinner for
their members and their families. The evening was
spent playing Bingo, followed by a Christmas gift
exchange for all present. Visiting and singing
Christmas carols rounded out a very full and en-
joyable evening. The committee deserves much credit
who prepared the dinner, and made so many beau-
tiful prizes for the bingo game, also those who dec-
orated the Christmas tree and room and attended
to all the details. A grand success was the result.

General Counsel's Exhibit No. 3—(Continued)

During the last month the shingle market has improved slightly but not enough to start the mills. Some of the mills in Canada are down, but their shingles are still coming in and flooding our market. If we could get them the same wages, hours and working conditions we have here, it would not be necessary to fight these competitive conditions unfair to our employees. Our program with the Union Label has succeeded in keeping out a lot of Canadian shingles in the west, but plenty of work remains to be done in the east and parts of the south. On Dec. 9, 11, 12, Cargill and Lederle and I went to all the heavy shake mills in that district and informed them of a meeting in Sedro Woolley for all shake operators on Dec. 28, 1951. On Dec. 28 this meeting was held at which 8 operators out of a possible 11 attended. We trust that some good will come out of it. Some of the shake operators have agreed to run six hours per day to try it out to find out whether or not they can make it. I was well pleased to have the Shingle Weavers well represented. Lederle, Peterson and Morris from Sedro Woolley; Walter and MacGilvary of Bellingham; Mokler from Anacortes; Sarrett and myself from the Council attended the five-hour meeting.

Up to this time we have 19 shake mills putting on our lable and running 6 hours. If the locals would help me out on this I know that we would have a lot more.

A Happy New Year To You All.

GENERAL COUNSEL'S EXHIBIT No. 4

(Received in Evidence March 24, 1952)

"Shingle Weaver"

March, 1952

SHINGLE FIRM CHARGES EMBARGO TRY
BY UNION

By Don Page

Union attempts to place an embargo on Canadian shingles came before the National Labor Relations Board recently.

The Sound Shingle company, of Marysville, filed unfair labor charges against the Washington-Oregon Shingle Weavers Conference for allegedly ordering its members not to work on shingles from Canada.

The Marysville firm had entered into a long term contract, its complaint read, to groove shingles sold in this country by the North Shore Shingle Co. of Vancouver B.C. Members of the American Federation of Labor Shingle Weavers Union, though, have refused to process the Canadian shingles.

In Seattle Secretary-Treasurer Charles Templer of the Shingle Weavers Council described their action as an effort to protect the American industry from cheap foreign competition.

Canadians' working conditions allow them to produce shingles cheaper than in this country, Templer said. American shingle weavers refused to process the Canadian product because it did not bear the union label as required in their contract.

General Counsel's Exhibit No. 4—(Continued)

“Shingle Weaver”

March, 1952

REPORT BY ART BROWN

The unfair Labor charge filed by the Sound Shingle Company, Mr. Martin against the Wash.-Oregon Shingle Weavers District Council and Arthur Brown has been answered by your Council officers and attorneys. I do not believe that this wonderful Taft-Hartley law can force the Shingle Weavers Union to use scab shingles, make shakes out of them and put our lable on same. Apparently some of the operators in the Everett District are in favor of using Canadian shingles as they gave Mr. Martin the honor of serving on the Joint Board this year judging from the notice received from the United States Shingle Industry, Inc. Perhaps they enjoy competing with one who runs the Perma Stain outfit at Chehalis who runs eight and nine hours per day and Saturday. According to the men who quit and came into our union they make more by far in six hours per day than they did in eight and nine down there. According to the request sent to the council office by the operators they want the 40 hour week. What for? Perhaps they wish to run five months instead of ten per year. Also they want the overtime to increase production changed, and the standby time to be 15 minutes or more before standby time is paid and other changes. A Mr. Frank Ward has arrived from the Carpenters office to assist us as an attorney in our case with the Sound Shingle Co. Also we may get help from the

General Counsel's Exhibit No. 4—(Continued)

A.F.L., as well as the State Federation of Labor according to Ed Weston, Pres. of the State Federation of Labor. In fact the offers of help and cooperation from near and far have been overwhelming. We deeply appreciate the friendship shown us. In summing up the situation, if they want a good fight they will get it. The Joint Board meets on Feb. 29th and I hope it will not be too long before the 1952 agreement comes out. Most mills are running through out the Industry, but the prices are still low and we are beginning to be short of sawyers.

“Shingle Weaver”

March, 1952

SARRETT'S REPORT

O. M. Sarrett

Right after the convention last year I spent the latter part of January and the first part of February in Oregon and Washington trying to eliminate the use of non-union shingles and shakes. In my survey of the housing projects in Seattle and Tacoma I found everything O.K. with the exception of some shakes from the Wood Beautifiers who have a plant in Seattle. The grooving of these shakes is done in a union plant but the staining is done on an eight hour basis by the painters union and these shakes do not bear the union label. At that time there were a lot of Canadian shakes being used in Portland, Salem, and Eugene. This situation is greatly improved now.

I started for California in the middle of February

General Counsel's Exhibit No. 4—(Continued)
and found the red wood mills running better than any time in the past several years. I stayed several days in the red woods signing up new members, also two mills. I then went on south, checking with Business Agents and lumber dealers in the Bay area and attending the California State Council of Carpenters Convention in Sacramento. I was extended every courtesy at this convention and given the floor where I thanked them for their fine cooperation. I then went on to Los Angeles where there was reported to be a shortage of shingles. I found that there had been a shortage several weeks before, but there were enough to go around at that time. I was assured of the continued support of the Shinglers Union and the Carpenters District Council at all times when there was sufficient union made materials available.

As I had not been getting very good cooperation in Utah and Colorado I made a trip to Denver by the way of Reno and Salt Lake City. Although I have called on these Business Agents several times asking for their cooperation on our Union Label Drive I don't think we are getting the support we have received in other areas. This is due to so many non-union carpenters working in this district. We can't expect much cooperation in any district where the Carpenters are poorly organized. On the way back I covered the southern part of Idaho and attended the Washington State Council of Carpenters Convention in Spokane. Bro. Nelson Lowe has always given us fine cooperation.

I went to the Executive Board meeting of the

General Counsel's Exhibit No. 4—(Continued)

Rocky Mountain District Council of Carpenters in Ontario, Oregon and the Oregon State Council of Carpenters Convention in The Dalles. At The Dalles Brother Abe Muir told the Oregon carpenters he was surprised and ashamed of them for their lack of interest in our Union Label Drive. He went on to tell them of the fine cooperation we had received in Calif. At the present time I am happy to report we are getting better cooperation than ever before. A lot of this is due to the help of Bro. Clell Harris and several of the Business Agents from the Portland District Council.

In June, I went to California to see if Canadian importations had anything to do with the poor shingle market. I found very few Canadian shingles and shakes but the slow market was caused by the former high price charged for shingles. All of the Shingles were working and applying about 80 per cent patent roofing.

I attended the Oregon State Federation Convention in Klamath Falls, also spent one day at the State Building Trades meeting held in the same city. Bro. Seydel and myself presented a resolution pertaining to the Label on wood shingles and shakes. This resolution was adopted.

In July I went to Eastern Washington by the way of Pasco and Spokane also stopped at Wenatchee, Moses Lake, and Yakima. Spokane area is still not too good as far as the Label is concerned, however the rest of Eastern Washington is O.K.

About this time Bro. Brown and myself tried to

General Counsel's Exhibit No. 4—(Continued)
organize the Perma Products Co., in Centralia. We had very little success but did have them placed on the unfair list of the Twin Cities Central Labor Council in Centralia.

I spent most of August in Calif., checking on the non-union shingle and shake situation as it was rumored there were a lot of them there. I covered the state from one end to the other, going down the coast route to San Diego and back by the inland route. I found this rumor was false as the only non-union stuff was old stock piled in the yards and not being used, and very little of that. There were very few Union Labeled heavy shakes anywhere in the state.

In September I made a trip to Spokane to try to get some action from the Carpenters there. From Spokane I went to Coeur d'Alene, Idaho and covered part of Montana. In Montana I found Union conditions much better than in Spokane.

On November 2, I left for Minneapolis, Minnesota, arriving there on November 4, the temperature just one degree above zero. On November 5, I called on J. H. Bakken, Secretary of the Twin Cities District Council, where I was extended every courtesy and promised all the help needed to clean up non-union shingles and shakes. Also called at the Building Trades office and had a long talk with the Secretary. The next day Business Agent Erickson took me to at least ten housing projects in the North end. No union shakes were being used. They were all from Canada and the Weyerhaeuser shake plant

General Counsel's Exhibit No. 4—(Continued)
in St. Paul. A few were Ranier Brand with no Labels. Jamison undercoursing were the only shingles I found with the Label.

There are a lot of new homes going up at this time; all the Carpenters working in this cold weather. They say it takes ten below to stop them. I saw several hundred homes under construction in the North End of Minneapolis alone, nearly all side wall shakes, but not a cedar shingle on the roof; all patent roofing. On Nov. 8, Business Agent Bergmann and myself covered the West side of Minneapolis, finding the picture about the same. Back to Carpenter's Local No. 7 where I called Bro. Bakken. He was surprised to hear of so many non-union shakes and shingles, and asked me to stay over until Nov. 12, to attend a District Council meeting and **explain** our problem to Business Agents from five counties around St. Paul and Minneapolis. On Nov. 9, Business Agent L. W. Heineman took me to the South section of Minneapolis. They were using Weyerhauser shakes, also many houses were side-walled with shingles from Port Moody, B.C. I also found a lot of No. 4's from Canada. Robert McNair brand.

I called on the Sawyer Cleaton Lumber Co., who was sure that Weyerhauser was the only one who could get him the colors they wanted. He was also handling Skookum Brand shakes from Portland, Oregon.

Bro. Heinemann and myself visited the Weyerhauser Staining Plant and were shown thru it by

General Counsel's Exhibit No. 4—(Continued)
the shake mill manager. There were a lot of Canadian shakes and some 24's from Forks, Wash. There must have been eight or ten carloads in storage and they were over half Canadian. We did not tell the manager who we were as they were over half Canadian. We did not tell the manager who we were as they are Union hating from the word go.

I went to St. Paul and talked with R. A. Olson and Geo. Lawson, President and Secretary of the Minnesota State Federation. Then called on Local 87 of the Carpenters. I was promised full cooperation at both places.

As the next day was Saturday and the Carpenter's offices were closed, I spent the day checking with various lumber yards. Mr. Anderson, of the Anderson Lumber Sales (Jamison dealer), was of the opinion that Weyerhaeuser was a monopoly on the market there. I found this opinion was shared by most of the other lumber dealers also.

On Monday, I attended the District Council meeting and explained our Union Label Drive and told them how successful we had been in California. They asked me many questions which I did my best to answer. They made a motion to give me full cooperation, and asked that I be present at their Executive Board meeting the next day, to work out the necessary details. At this meeting they agreed to send out a letter to all lumber dealers in the area and to each of their ten thousand members telling them after a reasonable length of time, they

General Counsel's Exhibit No. 4—(Continued)
would expect them to demand the Union Label on all shingles and shakes used.

Bro. Baaken and I had lunch with the Pres., and Secretary of the Home Builders Association in St. Paul. They promised to help us in every way possible to eliminate unfair competition.

As there was nothing more for me to do in Minneapolis and St. Paul at that time I went on to Milwaukee, Wisconsin, where I called at the District Council office on November 19. I met Business Agents Henry Kamoske, Raymond Gazinski, and L. V. Coles also Business Manager Ralph Bowes and Secretary Chas. Bartholmas. These Bros. were very interested and said they had done some work to help us before, but did not know how the Union shake situation was at present. They agreed to get a letter out to all contractors and dealers right away. The Carpenters in Milwaukee have a union shop agreement with the contractors as well as about 40 of the largest yards in this vicinity. This contract states they do not have to use material that does not bear the Label. Very few wood shingles are being used here, mostly side wall shakes.

As the Milwaukee Business Agents told me of a large side wall shake project in Sheboygan, Wisconsin, I went to that city to see if they were using union made shakes. Chas. Schurmeister, Business Agent there was not too happy to see me. I had a hard time convincing him I was not there to get his men out on strike. After I explained our set up to him, he called the boss on the job and let me

General Counsel's Exhibit No. 4—(Continued)
talk to him. The foreman, a nice man to talk to said he was using Canadian shakes at that time but wanted to cooperate with us. The Miller Lumber Co., of Milwaukie was running the job and furnishing the shingles and shakes. Back in Milwaukie Business Agent Kamoske reminded The Miller Lumber Co., of their union contract, when they agreed in the future they would buy only shingles and shakes bearing the Carpenter's union label.

I left Milwaukie on Nov. 21, for Toledo, Ohio to check on a large pre-fab housing plant that I heard were using non-union side wall shakes. Upon investigation I found they were using shakes from the non-union Perma Products Co. Business Agent Ernest Reiger had just signed this pre-fab outfit in the union. He promised me he would see to it that these shakes were not used, or any others without the Label.

As the Perma Products Co., have another plant in Cleveland I went there to see the Carpenters, to see what could be done. I talked with Carl Schwarzer, who is Pres., of the Ohio State Council of Carpenters and two Business Agents who informed me that Perma Products were shipping all of their unfair material out of the city. They knew of no job at that time in their jurisdiction that was using wood shingles or shakes. They also said they had tried to organize this firm two times before with little success. They told me that if any of the unfair shakes showed up on a union job they would not be used.

General Counsel's Exhibit No. 4—(Continued)

As there were very few shingles and shakes being used in Detroit, Chicago, Des Moines and Omaha, I stayed just long enough in each place to contact the District Council offices and Business Agents and explain our Union Label Drive. I am sure that any of these places where the Carpenters are fully organized we can depend on their help.

In Salt Lake City, Utah, I found non-union "Shakertowns" and "Cedar Wall" shakes advertised in the paper. I called at the District Council office and talked to Council secretary Hunt and Wm. Ryan, Pres. of the Utah State Council. Bro. Ryan asked for a letter fully explaining our Union Label Drive, and stated that he would draw up a resolution from this letter to be presented at the next Utah State Council of Carpenters Convention. Forty per cent of the shingles and shakes used are applied by non-union men. The Carpenters are helping us all they can but of course they can not stop the non-union men. This is going to be one of the best shingle and shake markets in the next few months.

They have recently formed a District Council in Denver and we have been promised better cooperation in this District. After I returned home I sent a letter they requested to be read at their District Council meeting.

In the month I spent in the Northwestern and Central states I did not have time to scratch the surface as there are so many District Councils and Local unions in these states. I tried to go to

General Counsel's Exhibit No. 4—(Continued)
the places where I could do the most good. I was disappointed in the number of new shingle roofs.

There were a lot of side wall shakes being used; also some shingles used on the side wall. The patent shingle people sure have the roofing business. Nearly every dealer I talked to said wood shingles were too high or had been too high. I think we can get support for the Label in the Northern states. We should find out where the shingles are used and go to these places, rather than try to cover the whole U.S.A.

I spent two or three weeks before Christmas in California to try to get some action on heavy shakes. I hope we can get more of these shakes down there with the Label, as I know we can get the support of the Carpenters if we can get enough with the Label to supply the market. We have seven heavy redwood shake mills in the union. These are all applying the Union Label. Most of the redwood shingle mills are down at this time due to the poor market. In the three and a half years I have been in the redwoods I have never seen so few redwood shingles cut as the present time.

P.S.—The Los Angeles City Council banned all shingles not meeting the standards of the inspection bureau.

Bro. John Thorburn
Pres. Arthur Brown

RESPONDENTS' EXHIBIT No. 2

(Received in Evidence March 24, 1952.)

In the District Court of the United States for the
Western District of Washington,
Southern Division

Civil Action No. 1360

WASHINGTON - OREGON SHINGLE WEAVERS DISTRICT COUNCIL, Plaintiff,

vs.

THE PERMA PRODUCTS COMPANY, a corporation, Defendant.

ANSWER AND COUNTERCLAIM

Comes now the defendant herein and for its answer to plaintiff's complaint alleges as follows:

I.

Answering paragraph I defendant does not have sufficient knowledge or information respecting the same so as to form a belief and therefore denies the whole thereof.

II.

Answering paragraph II defendant admits the same except it denies that the defendant's actions caused plaintiff any damage.

III.

Answering paragraph III, defendant does not

Respondents' Exhibit No. 2—(Continued)
have sufficient knowledge or information respecting the same so as to form a belief and therefore denies the whole thereof.

IV.

Answering paragraph IV, defendant does not have sufficient knowledge or information respecting the same so as to form a belief and therefore denies the whole thereof.

V.

Answering paragraph V, defendant does not have sufficient knowledge or information respecting the same so as to form a belief and therefore denies the whole thereof.

VI.

Answering paragraph VI, defendant does not have sufficient knowledge or information respecting the same so as to form a belief and therefore denies the whole thereof.

VII.

Answering paragraph VII, defendant admits that it has not recognized plaintiff's union or entered into any contract with plaintiff. With respect to the use of plaintiff's label, defendant does not claim any right to the use thereof and does not admit that it has used the same except in the manner and to the extent hereinafter set forth.

Respondents' Exhibit No. 2—(Continued)

VIII.

Answering paragraph VIII, defendant denies the same.

IX.

Answering paragraph IX, defendant denies the same.

X.

Answering paragraph X, defendant denies the same and particularly denies that plaintiff has been damaged in the sum of \$3000.00 or any sum.

XI.

Answering paragraph XI, defendant denies the same.

For a Further Answer and Counterclaim, defendant alleges as follows:

I.

That it is and at all times herein mentioned was a corporation organized under the laws of the State of Ohio duly qualified to do business in the State of Washington and doing business therein.

II.

Defendant does not manufacture any shingles or shingle products whatsoever. Its business consists solely of processing shingles by staining or by scoring and staining. Defendant purchases the shingles manufactured by others and receives them in bundles of the usual type, each bundle carrying the union

Respondents' Exhibit No. 2—(Continued)

label placed therein by the manufacturer thereof. That this defendant, after receiving such shingles, processes them by staining in some cases and in others by scoring and then staining. After such processing has been completed the shingles are then repacked and shipped. That up until on or about February 8, 1950, it was the practice of the defendant to replace on each package or bundle of shingles the union label which has been attached thereto by the manufacturer thereof.

III.

In replacing or reaffixing said union labels, defendant was actuated by the belief that said manufactured shingles were rightfully entitled to show said union label placed thereon by the manufacturers thereof and by the belief that this defendant ought not to remove said label therefrom.

That on or about February 8, 1950, defendant received a letter from the attorneys for the plaintiff herein complaining of defendant's practice in respect to the reaffixing of said labels. This letter of complaint was the first intimation or knowledge defendant had that said practice of the defendant was in any way objectionable to the plaintiff or to anyone whatsoever.

IV.

The defendant did not engage in said custom or practice for the purpose of deceiving the public or for the purpose of damaging the plaintiff or for the purpose of making any damaging misrepresentations as set forth in the plaintiff's complaint.

Respondents' Exhibit No. 2—(Continued)

V.

That immediately upon receiving said letter of complaint, the defendant ceased reaffixing said union labels to any and all bundles or packages of shingles so processed by it and at no time thereafter have any of said shingles so processed been sold or shipped by the defendant with said union label affixed thereto.

VI.

That in spite of the said discontinuance by the defendant, that plaintiff has nevertheless falsely and maliciously carried on a continuous circulation and publication of accusations against this defendant, falsely accusing it of making an unwarranted and unlawful use of said union label. That by said false and malicious statements so circulated and published, plaintiff has damaged the defendant in connection with its said business.

VII.

That by reason of said false and malicious continued misrepresentations of the facts in respect to defendant's alleged use of said label, defendant has been damaged in its business by reason of loss of business and loss of profits thereon in the sum of \$25,000.00.

Wherefore, defendant prays that plaintiff's action be dismissed and that it have judgment against the plaintiff for said sum together with its taxable

Respondents' Exhibit No. 2—(Continued)
costs and disbursements herein and for such other
and further relief as to the court may seem equitable.

**THE PERMA PRODUCTS
COMPANY, a corporation**

**By I. E. PHILLIPS,
Its President.**

**EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Defendant**

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R-X-3

CERTIGRADE
Red Cedar
SHINGLES

NO. 1
BLUE LABEL
GRADE

RED CEDAR SHINGLE BUREAU

100% Edge-grain 100% Clear 100% Heartwood
THESE SHINGLES ARE GUARANTEED TO MEET ALL THE QUALITY
REQUIREMENTS OF COMMERCIAL STANDARD C. S. 31-38 FOR RED
CEDAR SHINGLES AS ISSUED BY U. S. DEPARTMENT OF COMMERCE,
WASHINGTON, D. C.



2727
M. R. Smith Lumber
& Shingle Co.

Bozeman, Washington

THIS CARTON CONTAINS:
1 SQ.

SHAKERTOWN

16 INCH SCORED SHAKES (OUTER COURSE) STAINED
TO COVER 100 SQ. FT. AT 12 INCH EXPOSURE

CERTIGRADE
TRADE MARK
Red Cedar
SHINGLES

NO. 1 GRADE

100% Edge-grain 100% Clear 100% Heartwood
THESE SHINGLES ARE GUARANTEED TO MEET ALL THE
QUALITY REQUIREMENTS OF COMMERCIAL STANDARD
C. S. 31-38 FOR RED CEDAR SHINGLES AS ISSUED BY
U. S. DEPARTMENT OF COMMERCE, WASHINGTON, D. C.

Inspected for Certified by
RED CEDAR SHINGLE BUREAU
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RESPONDENT'S EXHIBIT No. 4
(Received in Evidence March 24, 1952.)

1950 AGREEMENT

Red Cedar Shingle and Western Softwood Shingle

This Agreement, made and entered into this 2nd day of February, 1951, by and between Sound Shingle Company, red cedar shingle manufacturer, and/or Western Softwood shingle manufacturer, hereinafter designated as the Employer, and the Washington - Oregon Shingle Weavers' District Council, hereinafter designated as the Union, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor.

General Purpose

**(a) The general purpose of this Agreement is, in the mutual interest of the Union and the Employer, to provide for the operation of all Red Cedar Shingle and Western softwood shingle mills, under conditions which will further to the fullest extent possible the safety and health of the employees, stabilization of operation, quality and quantity of production, elimination of waste, joint action against unfavorable legislation detrimental to the industry, hours of labor, minimum wage scales, and to regulate such conditions through a Joint Industrial Relations Board, hereinafter designated as the Board.

The Joint Industrial Relations Board

The Board shall be constituted as follows:

1. Labor. Seven (7) duly elected representatives

Respondents' Exhibit No. 4—(Continued)
of the Union to be known as the Union Negotiating Committee.

2. Management. Seven (7) duly elected representatives of Management to be known as the Employers' Negotiating Committee.

(b) The regular meeting date of the Board shall be the first Friday, following Washington's Birthday (February 22nd). Special meetings may be called on ten days' notice by the Chairman of either the Union or Employer groups. The purpose for which the special meetings are called shall be stated in the notice. If the purpose for which any meeting is called is to modify this contract or any provision thereof, sixty days' notice shall be given.

Termination

(a) This Agreement shall be and remain in force and effect until April 1, 1951, and providing that the Board is engaged in negotiations on a new working agreement on said date shall continue thereafter until such time as negotiations are terminated.

(b) During the life of this Agreement should conditions arise which in the opinion of either party of the Board make this Agreement in part or in whole inoperative, the said Board shall meet and attempt to overcome such conditions. If the Board is unable to conclude an agreement acceptable to the Union and the Employers then this Agreement may be terminated by either party at the expiration of sixty days. The sixty-day period to expire sixty days from date that official notice is received.

(c) It is understood that all changes in this

Respondents' Exhibit No. 4—(Continued)

Agreement are subject to approval by the Employers and by the Union membership.

Article I—Recognition

(a) The Employer recognizes the Union as the exclusive collective bargaining agent for all employees in and around the plant, except bona fide foreman, office and clerical help.

Article II—Employment, Discharge, Suspension

(a) The Employer retains the right to hire, discharge, or suspend:

1. All eligible employees in and around the plant on the effective date of this Agreement shall become members of the Union within thirty days of such date. All employees thereafter hired shall become members of the Union within thirty days of their employment. All employees shall as a condition of continued employment, maintain membership in the Union.

2. In hiring new help the Employer agrees not to discriminate against Union members when available and capable, and agrees to give preference to individuals who maintain their residence in the community.

3. It is understood that regular extra men upon becoming members of the Union shall have job rights the same as regularly assigned men.

4. The Employer shall explain the reason for discharge or suspension of any employee to the plant shop committee before such discharge or suspension becomes effective and will recognize an authorized representative of the Union as a member of the

Respondents' Exhibit No. 4—(Continued)

committee. Any alleged unjust suspension or discharge shall be called to the Employer's attention within the following three working days. In the event no complaint is made in writing within the said period, the right herein shall be deemed waived.

(b) Any person, covered by this Agreement, violating the following shall be subject to immediate discharge or suspension at the option of the Employer and disciplinary action by the Union:

1. Bringing intoxicants into or consuming intoxicants in the plant or on plant premises.
2. Reporting for duty under influence of liquor.
3. Neglect of job or workmanship.
4. Failure to report for duty without having notified both his Employer and the Union.
5. Engaging in an unauthorized work stoppage.

(c) The Union shall not be held responsible for the unauthorized acts of its members.

(d) Nothing in this Agreement shall be construed to make the quitting of his labor by an employee a violation of same.

**** Article III****Strikes or Lockout and Interpretation**

(a) There shall be no industry-wide lockout or strike during the life of this Agreement, until every means of the Board has been exhausted in an effort to secure a peaceful settlement.

(b) No strike or lockout shall be sanctioned in any plant until the following procedure has been completed:

1. The complaint of the Union or the Operator

Respondents' Exhibit No. 4—(Continued)

must be in writing and submitted to an authorized representative of the Union and an Employer member of the Board, or his authorized representative.

2. Both parties shall survey the situation and confer within forty-eight hours after receipt of the complaint.

3. If agreement cannot be reached which is satisfactory to the Union and the mill operator, each side shall submit to the other, in writing and within twenty-hour hours, all subjects upon which agreement could not be reached.

4. Within the following twenty-four hours, a further conference will be held in the presence of the aggrieved parties to attempt to iron out the differences.

(c) The Union shall serve a written notice on the Employer before establishing a picket line.

Interpretations

(a) The Chairman and Secretary of the Board are authorized to make interpretations of the provisions of this Agreement where they are in agreement, and such interpretations shall be accepted by the Local Unions and the Employers. Either the Local Union or the Employer shall have the right to appeal to the Joint Board whose interpretation shall be final.

(b) If the controversy is relative to an interpretation of the Agreement, and cannot be settled locally, the Local District Council Vice-President and an Employer member of the Board shall make a survey of the situation, and if they are in agreement

Respondents' Exhibit No. 4—(Continued)
as to the interpretation of the Agreement the decision shall be accepted by the Local Union and the Employer. But, either the Local Union or the Employer shall have the right to appeal to the Joint Board whose interpretation, however, shall be binding on both parties.

(c) All disputes, either local or industry-wide arising from the interpretation of this Agreement and all alleged violations of same shall be resolved exclusively through collective bargaining processes between the Union and the Employer.

Article IV—Holidays

The following holidays shall be observed:

1. New Year's Eve from 6:00 p.m. to New Year's Day and New Year's Day.
2. Memorial Day.
3. Fourth of July.
4. Labor Day.
5. Thanksgiving Day.
6. Christmas Eve from 6:00 p.m. and Christmas Day.
7. Armistice Day.

When any of the above fall on Sunday, the following Monday shall be observed.

Article V—Working Rules

(a) All repacking shall be paid for at the rate in effect.

** (b) Bona fide Union officers called from their jobs to attend Union business shall not lose their

Respondents' Exhibit No. 4—(Continued)

job rights. Sufficient time shall be given to secure a replacement except cases of emergency.

(c) Employees called to their jobs, but not put to work through no fault of their own, shall receive two (2) hours' pay, unless notified prior to reporting that their services are not required. This rule shall not apply if the portion of the plant in which the employee works is shut down by a breakdown, or if failure to put such employee to work is caused by something which the Employer could not reasonably foresee in time to give such notice. (Note—The two (2) hour minimum pay clause shall not be taken advantage of by the Employer to work employees two (2) hours only and then dismiss them.)

(d) No time lost during any work day shall be deducted unless such employees are dismissed either by signal or personal notice of dismissal for a definite period of sixty (60) minutes or more working time, except, at the end of the shift when a breakdown occurs, employees may be dismissed for the balance of the shift provided there is thirty (30) minutes or more time loss.

(e) The regular starting time and quitting time shall be observed, except in individual workman cases provided the workman is informed in writing of his definite hours and the same are agreeable to the Union and the Employer.

(f) No time lost shall be made up.

(g) Employees shall not lose their job rights due to closing of plant, and shall be returned to their

Respondents' Exhibit No. 4—(Continued)

former positions if available when the plant resumes operations.

(h) An employee entering military service of the United States or drafted into Government service shall upon being discharged and for forty (40) days after such discharge, and if he so elects, be entitled to full job rights at the place of his former employment.

(i) Any employee transferred temporarily within a shift period to a higher paid job shall receive the hourly rate of pay of the job to which he is transferred. An employee transferred temporarily within a shift period to a lower paid job shall continue to receive the hourly rate of pay of his regular job.

(j) Packers shall not be required as a condition of employment to do any other work than packing.

(k) As a condition of employment, engineers, electricians, filers and millwrights shall not be required to furnish mechanical tools. In the event any employee does bring tools into the plant and said tools are destroyed by fire, he shall be reimbursed for same provided an inventory and value is filed with his employer at the time of employment.

Article VI—Picket Line

(a) During the life of this Agreement no member of the Union shall be required to work under police protection or go through a legitimate picket line.

(b) In the event a picket line is established on an

Respondents' Exhibit No. 4—(Continued)

operation, other than one ordered by the Union, the Union will notify the Employer, as soon as possible, the position of its members relative to such picket line.

(c) All shingles and by-products produced fair shall not be declared unfair providing the plant does not attempt to operate unfair with fair stock on hand.

Article VII—Vacation

(a) Six (6) cents per hour shall be paid in lieu of vacation with pay.

Article VIII—Local Problems

(a) Problems not of an industry nature are to be adjusted locally, but in no event shall decisions or local rules be made which conflict with the provisions and intent of this Agreement.

(b) Problems created by excessive sorting of timber for long shingle machines are considered a local problem.

(c) All the provisions of Article III shall be complied with in the settlement of local problems.

Article IX—Hours of Labor and Maintenance

(a) The regular hours of labor shall not exceed (6) hours in any twenty-four (24) hour period nor exceed thirty (30) hours per week unless time and one-half is paid, except

(b) Watchmen shall not exceed forty (40) hours

Respondents' Exhibit No. 4—(Continued)

per week unless time and one-half is paid. Combination fireman and watchman becomes a watchman when he ceases to perform any other duty.

(c) Sunday and holidays designated as such in the Agreement shall be paid at time and one-half except watchmen when the mill is down.

(d) With the exception of the sixth day's work as provided in (g) below, the overtime clause shall not be used to increase production except where loss of an employee, through failure to report for duty, quitting without notice, or for any other reason over which the Employer or the Union has no control and which curtails production. Union men are permitted to work overtime at rate and one-half to maintain production until the Employer or the Union can obtain a man or men. Refusal to accept overtime employment shall not be cause for dismissal, regular maintenance men on emergency jobs excepted. The Union shall designate the procedure to be used in working regular employees on overtime.

(e) Sawyer's make-ready pay (See Article X (d) and packers' cleanup pay (See Article X (i) are additional exceptions to section (a) of this Article.

(f) Each employee and the Union shall be notified in writing by the Employer what hours and/or minutes of regular scheduled overtime are to be worked.

(g) The sixth day of work in any regular sched-

Respondents' Exhibit No. 4—(Continued)

uled workweek shall be considered as a regular work day except that rate and one-half shall be paid. Any day that an employee is available and ready for work shall be considered as a day worked, for the purpose of determining the employee's sixth day in any regular scheduled work week. The sixth day's work is optional with the Employer.

(h) The work week shall commence on Monday and end on Sunday, except: For second and third shifts, where by mutual agreement, a Sunday night shift is worked, the work week shall start with Sunday and end with Saturday.

Under the foregoing sections (g) and (h) any employee who works regularly on Sunday and has a regular day off during which he is not subject to call, would not be entitled to time and one-half for Saturday work. If, by prior arrangement he should work on his regular day off, he shall receive time and one-half, and the day would count in computing the sixth day's pay. If an employee works regularly seven days a week, he shall receive time and one-half for the sixth day's work and for Sunday.

Article X—Minimum Wage Rates

(a) As of May 16, 1950, the minimum wage rate shall be \$1.68 per hour.

(b) The minimum wage bracket classification shall be:

1. Clean-up man; 2. Bandnailer; 3. Woodpicker; 4. Second Car Loader; 5. Watchman, and such other designations as may be classified by the Union and the Employer.

Respondents' Exhibit No. 4—(Continued)

(c) The pay spread between the bracket classifications shall remain as adjusted in 1938, except that rates of pay adjustments that are necessary to correct maladjustments, or inequalities, or to correct gross inequities may be adjusted by a committee composed of the Employer and the Union, on which an authorized representative of the District Council and the Secretary of the Joint Board shall act. In case agreement cannot be reached the provisions of Article III shall be complied with.

(d) Shingle sawyers shall be paid at the following minimum rate per square based on the present requirements of the National Bureau of Standards, plus one dollar and one-half cent (\$1.00½) per hour:

Grade No. 1	Grade No. 2	Grade No. 3
24-inch..34c	24-inch..24c	24-inch..24c
18-inch..34c	18-inch..24c	18-inch..24c
16-inch..34c	16-inch..24c	16-inch..24c

Sawyers: When required to do any or all of the following make-ready tasks shall be paid at the straight time rate of \$2.38 per hour:

1. Changing shingle and clipper saw. 9 minutes
2. Filing clipper saw..... 7 minutes
3. Picking up hoodlums..... 7 minutes
4. Oiling machines 4 minutes
5. Otherwise preparing machines for
operation 3 minutes

Total for all tasks.....30 minutes

General Counsel's Exhibit No. 4—(Continued)

The time allowance agreed upon for the various tasks fairly represent average industry-wide experience.

The parties have also agreed that the classification No. 5 task "otherwise preparing machines for operation," does not include repairing or maintenance work, but covers only such minor operations as have been performed in the past.

It is agreed that the Employer has the option of relieving the sawyer of any or all tasks in the foregoing.

(e) Sawing dimensions shall be fifteen (15c) per square over the regular rate per grade.

(f) Any regular employee in a one-machine mill who does the fitting, in addition to his other duties, the rate shall be one hour based on an hourly rate of \$2.38 per hour at time and one half (\$3.57 per shift) or fourteen (14c) cents per square, whichever is greater, computed over a payroll period.

(g) Sawyers doing their own machine repair work (outside of minor adjustments) shall be paid at the prevailing rate for maintenance work, for said machine work.

(h) Sawyers, when required to point their own shingle saws, shall be paid at the rate of (1c) cent per square additional.

(i) Packing shall be paid the following minimum rate per square based on the present requirements of

Respondents' Exhibit No. 4—(Continued)

the National Bureau of Standards, plus one dollar and one-half cent (\$1.00½) per hour:

Grade No. 1	Grade No. 2	Grade No. 3
24-inch..22c	24-inch..22c	24-inch..22c
18-inch..22c	18-inch..22c	18-inch..22c
16-inch..22c	16-inch..22c	16-inch..22c

1. Packers shall receive one (1c) cent per square in addition to the regular rate in effect in the plant for all shingles packed. This is compensation for overtime the packer might be required to work, regardless of when this work is performed, in cleaning out bins and packing out shingles which may remain in the bins.

2. One-half (½c) cent per square in addition to the regular rate in effect in the plant shall be paid where two nails are used.

3. Packing five bundle square (16/16 courses) shall be one (1c) cent per square above the regular rate.

4. Each packer working under a machine in addition to his regularly assigned machined (split bin packer) shall receive twenty-two (22c) cents per square for singles packed under the regularly assigned machine, and shall receive forty-five and one-half (45½c) cents per square for shingles packed under the unassigned machine. In addition to these piece rates, each packer shall receive one dollar and one-half cent (\$1.00½c) per hour for a six-hour shift.

Respondents' Exhibit No. 4—(Continued)

5. Sawyers and/or packers sawing and packing shall receive the sawing rate for piecework plus the split bin rate for packing plus the day rate for one-half the time worked.

(j) Packing 4-inch dimensions shall be fifteen (15c) cents per square above the regular rate. Packing 5-inch and 6-inch dimensions shall be ten (10c) cents per square above the regular rate.

(k) Packing and nailing bands shall be two (2c) cents per square above the regular rate.

Packing and nailing bands where two nails are used shall be three (3c) cents above the regular rate.

(1) Packing and tallying shall be two (2c) cents per square above the regular rate.

(m) Packing, nailing bands and tallying shall be four (4c) cents per square above the regular rate.

(n) Temporary men will be paid at the regular Union rate.

(o) Workmen on the second shift shall receive four (4c) cents per hour over the regular rate. Workmen on the third and/or fourth shifts shall receive six (6c) cents per hour over their regular rate. These differentials shall not apply to watchmen.

(p) Sawyers shall be paid at the hourly rate of \$2.38 and packers at the hourly rate of \$1.94 for all periods during which the operation is down due

Respondents' Exhibit No. 4—(Continued)

to lack of blocks or breakdown and during which they are held on duty by the Employer awaiting resumption of operations. No allowance shall be made for standby time until the time of shutdowns equals fifteen minutes in any one shift and such accumulations shall not be carried forward from one shift to another.

1. No pieceworkers shall be dismissed because of a breakdown for a period less than sixty (60) minutes except, at the end of the shift, employees may be dismissed for the balance of the shift provided there is thirty (30) minutes or more time loss. Employees drawing standby pay shall remain available for resumption of work.

(q) When all or a major part of a shift is worked on timber other than cedar or redwood, the following differentials in wage rates shall be paid:

Sawyers, 5c per square
Packers, 5c per square
Tallyman, 5c per hour
Blockpiler, 5c per hour
Deck Crew, 15c per hour
Green Loader, 5c per hour
Filer, 15c per hour

The foregoing differentials are not in addition to differentials being paid as of March 31, 1947.

(r) It is agreed, that if, during the term of this contract, and its continuation as agreed upon by the Joint Industrial Relations Board, there shall

Respondents' Exhibit No. 4—(Continued)

be variations in the price of shingles above a base price as determined by methods to be agreed upon, bonus payments shall be made.

1. The minimum wage shall be \$1.68 per hour and all differentials between bracket classifications shall remain the same except as they may be adjusted under Article X (c), and with the further exception that in the event an across the board wage change takes place in the douglas fir industry, the above minimum, together with all other classifications shall be adjusted uniformly in an amount sufficient to maintain the existing differential between the minimums of the douglas fir area and the shingle industry, and thereafter shall be adjusted uniformly to maintain said differential but shall in no event be reduced below the rates in effect November 30, 1947. If lumber industry wage adjustments are made retroactive, the date the adjustment in the shingle industry shall be effective, shall be the beginning of the payroll period during which the lumber industry adjustments are agreed to.

2. Should the regular wage rates be changed in accord with subsection 1, the current bonus rate shall be increased or decreased inversely to correspond exactly with such changes, and the base price shall be increased four times the amount of any upward wage adjustment or decreased four times the amount of any downward wage adjustment.

3. Special meetings of the bonus committee shall be held when necessary, to carry out the provisions

Respondents' Exhibit No. 4—(Continued)

of the above subsections, at which times the appropriate amendments to the wage clause in this Article will be made and announced.

4. A committee which shall be chosen by the Joint Board shall meet on the tenth day of each month for the purpose of determining and announcing changes in the bonus rate.

5. Under rules which shall be agreed to by the Joint Board, the net mill price of grades No. 1, No. 2, and No. 3, 16-inch shingles sold during the preceding month in which the committee meeting is held, shall be obtained. The average of the prices thus obtained shall be used, allowing for 60% of grade No. 1, 30% of grade No. 2 and 10% of grade No. 3, to determine the amount of price change.

6. For each full 4c increase in price above the current base price per square, the bonus shall be 1c per hour at straight time in all classifications for all hours worked, payable each regular payday.

7. For each full 4c decrease in price, the bonus shall be decreased 1c per hour.

** (s) Apprentices. When an apprentice is assigned to a regular machine for the purpose of learning the trade, he shall receive \$1.68 per hour plus the regular piece rate plus make ready time and vacation allowance. The apprentice period shall not exceed sixty (60) days or until assignment to a regular job, whichever shall come first. The standby rate for apprentice shall be at the rate of \$1.68 per

Respondents' Exhibit No. 4—(Continued)

hour. Upon assignment to a regular job, the regular rate shall apply.

** (t) A special wage increase of 15c per hour to be paid across the board, effective June 16, 1950. This increase not to affect the bonus base or make ready, standby or other rate classifications but is to be paid at straight time to all employees for all hours worked. Any wage adjustments made during June, 1950, that were, in reality, a wage increase, shall be used as an offset to this amount. This special wage increase is subject to reconsideration by the Joint Board at a meeting that may be called on ten days' notice by either party after October 1, 1950.

It is agreed that the bonus to be paid in July, 1950, shall be 6c per hour or more.

Article XI—Miscellaneous

(a) A monthly statement shall be issued to all employees, showing hours worked and squares produced and their respective rates.

(b) Lunch rooms, etc. Every effort will be made by the Employers to provide lunch and locker rooms or cloak rooms, smoking rooms, and adequate toilet facilities. Lunch and smoking rooms to be large enough to accommodate the majority of the crew on each shift. These rooms to be kept clean, well-heated, and well-ventilated.

(c) Common Bins. The Employer is urged to make every effort to discontinue the practice of re-

Respondents' Exhibit No. 4—(Continued)

quiring two or more sawyers to throw singles into a common bin.

(d) The Joint Industrial Relations Board agrees that the safety codes of all States in which shingles are manufactured shall be complied with regardless of the type of accident insurance coverage. The Board agrees specifically that the laws, rules, and regulations of the State in which a plant is located, which pertains to the safety and health of industrial workers, shall be observed so far as practicable and no plant shall be exempt from observing State laws. In the event of Official Union complaint to the Joint Board that the State laws relating to safety codes are not being observed in any individual mill or mills, the Local Union involved shall call for an inspection of the condition complained of, by a State safety inspector in the State in which the alleged non-observance has occurred. In the event of a final determination by the State Safety Department of material non-observance then Article III of the Industry Agreement may be invoked.

The foregoing Agreement was negotiated by the the following members of the Joint Industrial Relations Board and is recommended to the Union and the Manufacturers.

For the Employers: George Plumb, Chairman, Frank L. Marshall, R. D. Mackie, Virgil Griffen, W. C. Pearce, E. C. Newberg, Paul R. Smith.

For the Union: Arthur Brown, Chairman, Charles

Respondents' Exhibit No. 4—(Continued)

A. Templer, William Cargill, Harvey Swain, Lonnie Harrison, Clarence Romaine, Fred Seydell, Fred Baker.

D. M. Williams, Secretary of the Board.

For the Union: (Signed) Glen Uttley, No. and name of local 2580.

Name of Firm: Sound Shingle Co. (Signed) Ralph E. Stuck, Box 863, Marysville, Wash.

**** Changes.**

Clarifications

Article II (a) (3) Employees whose regular duties include carrying the clock as watchman for the full time he is working while the plant is operating, shall have seniority as watchman when the plant is down.

****Article V (g)** When a plant closes down for any reason, a man may work in any number of mills. However, when the original mill resumes operation the members of the crew who were laid off due to closing of plant must make a decision as to which mill they desire to hold job rights in.

Article IX (g):

1. A sawyer called the mill and stated he would not be able to work the regular shift. Question: Would the packer, who came to the mill but was sent home because of the absence of his sawyer, be paid

Respondents' Exhibit No. 4—(Continued)

at time and one-half on the sixth day? Answer: Yes.

2. A workman did not show up for work and stated the next day that he had been sick. Question: Would he be entitled to time and one-half on the sixth day of work? Answer: No.

3. Question: Are regular extra men who have been available and subject to call, qualified for time and one-half on the sixth day even though they have not worked the five previous days? Answer: Yes, if available to the same mill the five previous days. Clarifications: If a man has made an arrangement with the mill to be on the extra list and has been available to the same mill for the five previous days, he is subject to time and one-half if he works the sixth day. There are two points to consider—First—did he apply for work and arrange with mill to be on the extra list? Second—was he available when called? If the answers are yes, then he is entitled to time and one-half on the sixth day if he is called and works that day.

4. A workman lays off and gets a man to take his place. Question: Would he be paid time and one-half on the sixth day? Answer: No.

5. Question: Would standby and make-ready time be paid at time and one-half on the sixth day? Answer: Yes.

6. A man works five days for one mill and the sixth at some other mill. Question: Is he entitled to

Respondents' Exhibit No. 4—(Continued)

time and one-half on the sixth day? Answer: Yes, but must be willing to furnish proof that he had worked the five previous days.

7. Question: Is a regular holiday as defined in the Agreement considered a day worked for the purpose of determining the sixth day's pay? Answer: Yes.

8. Question: Is a fireman or similar workman who works a holiday at time and one-half entitled to time and one-half on the sixth day? Answer: Yes.

9. Men called on official Union business shall be considered as on the job for the purpose of determining their status on the sixth day of work, and their replacement is to be paid on the same basis.

10. Time lost by a workman where necessary in exercising his right to vote in State or National elections, shall be figured as time worked in figuring overtime on the sixth day, where every reasonable effort has been made to secure a replacement and two weeks' notice has been given the Employer.

Article IX (h) Second paragraph. This clause pertains to firemen only.

**Article X Wage increases by the hour are in addition to rates in effect on the effective date of the increase.

Article X (p) (1) Employees dismissed under this clause shall be paid for actual time put in up to the time of dismissal. For example—employees dis-

Respondents' Exhibit No. 4—(Continued)

missed after two hours and fifteen minutes of work shall be paid for only two hours and fifteen minutes.

Article X (r) (1) In clarification of this section it was agreed that for the purpose of the section the month is divided into two payroll periods.

JOINT INDUSTRIAL RELATIONS
BOARD

By ARTHUR BROWN,

Chairman,

By DAVID M. WILLIAMS,

Secretary

R-X-5

WHITE FALLS SINGLE
16-5/2
XXXXXX
No. 1
GRADE

NATIONAL LABOR RELATIONS BOARD

Docket No. 19-CC-4 OFFICIAL COURT NO.

Disposition

Received

Rejected

In the matter of Wash. Ice Storage Warehouse

Sub 4-2457

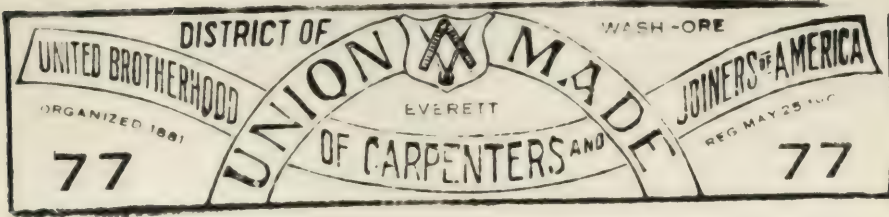
Reporter W. F. MILLER

DISTRICT OF COLUMBIA WASH.-D.C.
UNITED UNION OF CARPENTERS & JOINERS
69 1900 C.E.B. 69

SENECA 6388

R-x-6

KING COUNTY DISPENSERS, INC.
AFFILIATED WITH
WASHINGTON STATE DISPENSERS, INC.
602 EITEL BUILDING
SEATTLE 1, WASHINGTON



NATIONAL LABOR RELATIONS BOARD

Docket No. 19 CC 42 OFFICIAL EXHIBIT NO. 6

Disposition	Identified	Received	Rejected
	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

In the matter of Wash. Ore. Shovel Weavers

RESPONDENTS' EXHIBIT No. 7
(Received in Evidence March 24, 1952)

CONSTITUTION AND LAWS

of the United Brotherhood of Carpenters and Joiners of America and rules for subordinate bodies under its jurisdiction.

Established August 12, 1881

Constitution as Amended

January 1, 1951

CONSTITUTION

Name of Organization

A. Section 1. This organization shall be known as the United Brotherhood of Carpenters and Joiners of America, and shall consist of an unlimited number of Local Unions and members subject to its laws and usages and shall not be dissolved while there are three (3) dissenting Local Unions.

B. The following abbreviations, when used in the United Brotherhood, shall have these meanings, viz:

U. B.—United Brotherhood.

G. E. B.—General Executive Board.

B. of T.—Board of Trustees.

S. C.—State Council.

P. C.—Provincial Council.

D. C.—District Council.

G. P.—General President.

1st G. V. P.—First General Vice-President.

2d G. V. P.—Second General Vice-President.

Respondents' Exhibit No. 7—(Continued)

G. S.—General Secretary.

G. T.—General Treasurer.

L. U.—Local Union.

R. S.—Recording Secretary.

F. S.—Financial Secretary.

G. O.—General Office.

Objects

Section 2. The objects of the United Brotherhood are: To discourage piece work, to encourage an apprentice system and a higher standard of skill, to cultivate friendship, to assist each other to secure employment, to reduce the hours of daily labor, to secure adequate pay for our work, to establish a weekly pay day, to furnish aid in cases of death or permanent disability, and by legal and proper means to elevate the moral, intellectual and social conditions of all our members, and to improve the trade.

Our Principles

Section 3. Resolved, That we as a body thoroughly approve of the objects of the American Federation of Labor and pledge ourselves to give it our earnest and hearty support.

Union-Made Goods

Resolved, That members of this organization should make it a rule, when purchasing goods, to call for those which bear the trade mark of organized labor, and when any individual, firm or corporation shall strike a blow at labor organizations, they

Respondents' Exhibit No. 7—(Continued)
are earnestly requested to give that individual, firm or corporation their careful consideration.

Labor Legislation

Resolved, That it is of the greatest importance that members should vote intelligently, hence the members of this Brotherhood shall strive to secure legislation in favor of those who produce the wealth of the country, and all discussions and resolutions in that direction shall be in order at any regular meeting, but party politics must be excluded.

Immigration

Resolved, That while we welcome to our shores all who come with the honest intention of becoming lawful citizens, we at the same time condemn the present system which allows the importation of destitute laborers, and we urge organized labor everywhere to endeavor to secure the enactment of more stringent immigration laws.

Faithful Work

Resolved, That we hold it as a sacred principle that Trade Union men, above all others, should set a good example as good and faithful workmen, performing their duties to their employers with honor to themselves and their organization.

Shorter Hours of Labor

We hold a reduction of hours for a day's work increases the intelligence and happiness of the laborer, and also increases the demand for labor and the price of a day's work. We advocate the adop-

Respondents' Exhibit No. 7—(Continued)
tion of the Five-Day, Thirty-Hour Work Week
and urge all Local Unions to put this into effect
as soon as possible.

Miscellaneous

We recognize that the interests of all labor are identical regardless of occupation, nationality, religion, or color, for a wrong done to one is a wrong done to all.

We object to prison contract labor, because it puts the criminal in competition with honorable labor for the purpose of cutting down wages, and also because it helps to overstock the labor market.

Headquarters, General Office and Home

Section 4. The Headquarters and General Office of the United Brotherhood shall be located in Indianapolis, Ind., until removed by a Convention and sustained by a referendum vote of the Brotherhood.

Printing Plant

A. Section 5. The General Executive Board shall have power to install and operate a printing plant at Headquarters in Indianapolis, Ind.

Home

B. The Home for Aged Members shall be located at Lakeland, Florida.

Jurisdiction

A. Section 6. The jurisdiction of the United Brotherhood of Carpenters and Joiners of America shall include all branches of the Carpenter and

Respondents' Exhibit No. 7—(Continued)

Joiner trade. In it shall be vested the power through the International Body to establish and charter Subordinate Local and Auxiliary Unions, District, State and Provincial Councils in all branches of the trade, and all other skilled employes working at the industry, and its mandates must be observed and obeyed at all times.

B. The right is reserved to the United Brotherhood through the International Body to regulate and determine all matters pertaining to fellowship in its various branches and kindred trades.

C. To subordinate Local or Auxiliary Unions, District, State and Provincial Councils the right is conceded to make necessary laws for Locals and District, State and Provincial Councils which do not conflict with the laws of the International Body.

D. The right is reserved to establish jurisdiction over any Local or Auxiliary Unions, District, State or Provincial Councils whose affairs are conducted in such a manner as to be a menace to the welfare of the International Body.

E. The United Brotherhood shall enact and enforce laws for its government and that of subordinate Locals and Auxiliary Unions and District, State and Provincial Councils and members thereof.

Trade Autonomy

A. Section 7. The trade autonomy of the United Brotherhood of Carpenters and Joiners of America consists of the milling, fashioning, joining, assembling, erecting, fastening or dismantling of all ma-

Respondents' Exhibit No. 7—(Continued)

terial of wood, hollow metal or fiber, or of products composed in part of wood, hollow metal or fiber, the laying of cork and composition, and all other resilient floor covering, all shingles, the erecting and dismantling of machinery and the manufacturing of all wood materials, where the skill, knowledge and training of a carpenter are required, either through the operation of machine or hand tools.

B. Our claim of jurisdiction, therefore, extends over the following divisions and subdivisions of the trade:

Carpenters and Joiners, Railroad Carpenters, Bench Hands, Stair Builders, Millwrights, Furniture Workers, Shipwrights and Boat Builders, Reed and Rattan Workers, Ship Carpenters, Joiners and Caulkers, Cabinet Makers, Casket and Coffin Makers, Box Makers, Bridge, Dock and Wharf Carpenters, Car Builders, Floor Layers, Underpinners and Timbermen, Pile Drivers, shorers and House Movers, Loggers, Lumber and Sawmill Workers, and all those engaged in the running of woodworking machinery, or engaged as helpers to any of the above divisions or subdivisions or the handling of material on any of the above divisions or subdivisions.

When the term "carpenter and joiner" is used, it shall mean all the subdivisions of the trade as herein specified.

Division of Laws

A. Section 8. The Constitution shall be compiled in three parts, viz: Constitution, General By-Laws, General Laws.

Respondents' Exhibit No. 7—(Continued)

B. The laws of the United Brotherhood shall comprise, first: The Constitution, which shall contain the outline, fundamental principles, policies and objects of the Organization; the jurisdiction of the International Body, Local and Auxiliary Unions, District, State and Provincial Councils; the list of Officers and their general duties, and all matters pertaining to the raising of revenue.

C. The General By-Laws, which shall contain the order of procedure in convention, the specific duties of officers, delegates and committees, the compensation of the General Officers and Representatives, and the standing rules and rules of order.

D. The General Laws, which shall contain all matters pertaining to the relations of members, Local and Auxiliary Unions and District, State and Provincial Councils to each other, and all employees and others outside the jurisdiction of the United Brotherhood.

E. Constitution and all Laws shall be amended only by referendum, unless otherwise directed by a General Convention of the United Brotherhood.

General Officers and Elections

A. Section 9. General Officers of the United Brotherhood shall consist of a General President, First and Second General Vice-Presidents, a General Secretary, a General Treasurer, and an Executive Board of one member from each district of

Respondents' Exhibit No. 7—(Continued)
the United Brotherhood, who shall be exempt from all duties in their respective Local Unions.

B. The names of all nominees for General Officers shall be referred to the members of the United Brotherhood for referendum vote, and the nominees receiving a plurality vote of the members voting shall be declared elected. Nominations for all General Officers shall be made on the fourth day of the first week of the Convention, and submitted to the members for referendum vote. The foregoing officers shall be elected by the Australian ballot system in the following manner: The names of all nominees shall be printed on official ballots, supplied by the United Brotherhood, the member making an X opposite the name of the nominee the member wishes to vote for. The use of all other ballots shall be prohibited.

C. Election returns to be counted by the Tabulation Committee must be received at the General Office not later than the date designated by the General Executive Board. The Tabulation Committee shall report in writing to the General President their findings of all votes cast by Locals for each candidate, and the candidate receiving a plurality of all legal votes cast shall be declared elected and shall hold office for a term of four years, commencing April 1st following election and continuing thereafter every four years, or until their successors are duly chosen and qualified. A full accounting of each Local Union's vote shall be published in pamphlet form and distributed to all Local

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Unions in the same manner as the monthly Financial Statement.

D. Election of all officers shall be held at such time as may be designated by the General Executive Board following the Convention. All members must be notified by first-class mail of the time and place of such election. Ballots for the election shall be mailed to each Local Union at least twenty days preceding the week of the election.

E. The President, Recording Secretary and Financial Secretary of the Local Union shall be present during the time set for such election. The President shall appoint two tellers, who shall be members of the Local Union. The President shall act as judge of the election and shall have charge of the official ballots provided by the United Brotherhood for such election and shall be responsible for the proper distribution of the same. The Recording Secretary shall act as clerk of election, and the Financial Secretary shall certify to the right of the members to vote. No member shall be allowed to vote unless the member is in good standing in said Local Union.

F. All ballots shall be marked by making an X opposite the names of the nominees to be voted for, and shall be immediately placed by the member voting in a box provided for such purpose by the Local Union, which shall be in charge of the President. After the time for balloting has elapsed, the ballots shall be counted by the tellers in the presence of the President. The Recording Secretary

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shall then prepare duplicate statements showing the number of votes cast for each candidate on election forms furnished by the General Secretary. Such statements must be signed by the tellers, attested by the President and Recording Secretary and have seal attached. One copy must be sent to the General Secretary by the Recording Secretary and President by registered mail, and one copy must be retained by the Local Union. All election returns must be sent to the General Secretary in sealed envelopes, said envelopes to be furnished by the General Secretary and marked "Election Returns, Care of General Secretary, United Brotherhood of Carpenters and Joiners of America, Carpenters' Building, Indianapolis, Ind." The General Secretary shall turn over all Election Returns to the Tabulation Committee, when they report for duty, in the same condition as received. All voted ballots to be counted must be sent by registered mail or parcel post to the General Secretary by the Recording Secretary following the election, and all blank ballots shall be immediately destroyed by the Local Union.

G. Failing to comply with this Section, the Local Union shall be fined Twenty-five Dollars (\$25.00) by the General President, the fine to be paid to the General Office prior to any per capita tax, and the Local Union paying said fine shall collect the amount of the fine from the President and Recording Secretary of the Local Union fined.

H. There shall be a Tabulation Committee of

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five members elected at each General Convention, who shall meet at the General Office following the election. They shall tabulate all votes as cast by each Local Union for each candidate, according to the intent of the voters, and no Local Union's vote shall be rejected for cause unless first proven that such vote was not properly filed or was fraudulently cast, and then not until the protested Local Union has had a reasonable notice to file answer with the Tabulation Committee. When the Tabulation Committee finally rejects a Local Union's vote as cast, notice of same must be given the Local Union involved. Appeal for a recount may be taken to the General Executive Board from the count or decision of the Tabulating Committee by any Local Union whose vote is rejected by the Tabulation Committee, and all such votes shall be counted for the candidates in accordance with the decision of the General Executive Board. All such appeals must be attested before a Notary Public by affidavits as to the truth of their written or printed statements.

I. Any candidate shall have the right to be represented, without expense to the United Brotherhood, at the count of the votes, and have the right to examine any statement, sheet or ballot upon request.

J. Any member, Local Union, District Council, Provincial Council or State Council which sends out any letter, or letters or circulars of a scurrilous or defamatory nature against any candidate for office in the United Brotherhood, unless such can-

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didate has been charged, tried and found guilty of a violation of some provision or provisions of the laws of the United Brotherhood, shall be expelled.

K. No member shall be elected or appointed to any Local or General Office, representative or deputy, or a delegate to any Central Body or to a Convention unless such member is a citizen of the United States or Canada, provided membership has been held in the United Brotherhood sufficient time to obtain citizenship and the member to be eligible to serve in any such capacity must be a citizen of the country in which office is held.

L. A member to be eligible for nomination and election as a General Officer must be a full beneficial member.

General President

A. Section 10. The General President shall issue and sign all charters, may grant dispensations in extraordinary cases and shall fill any vacancies among the General Officers by consent of a majority of the General Executive Board. The General President may appoint any member of the United Brotherhood in good standing as a representative on request of any District Council on a majority vote at a called meeting, or on a majority vote of any Local Union, where a District Council does not exist. The compensation for Representatives shall be One Hundred Seventy-Five (\$175.00) Dollars per week.

B. The General President may personally, or by deputy, take possession for examination of all

Respondents' Exhibit No. 7—(Continued)

books, papers and financial accounts of any Local Union, District Council, State Council or Provincial Council, summarily when necessary, and the same shall remain in possession of the General President within the jurisdiction of the Local Union, District Council, State Council or Provincial Council until a complete report has been made and filed. During said examination a representative of the Local Union, District Council, State Council or Provincial Council may be present.

C. The General President may issue charters to Ladies Auxiliary Unions composed of the mothers, wives, daughters and sisters of members of the United Brotherhood.

D. The General President may issue charters to Auxiliary Unions composed of persons working at an industry where organization would be a benefit to the United Brotherhood.

E. The General President shall appoint a committee to compile the laws of the United Brotherhood, and all other committees unless otherwise provided. The compensation of all members of committees shall be regulated by the General Executive Board.

F. The General President shall decide all points of law, appeals and grievances, except death and disability claims, and have power to suspend any Local Union, District Council, State Council or Provincial Council for violation of the Constitution and Laws of the United Brotherhood subject to an appeal to the General Executive Board. Any Local

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or Auxiliary Union, District Council, State Council or Provincial Council which wilfully or directly violates the Constitution, Laws or principles of this United Brotherhood, or acts in antagonism to its welfare, can be suspended by the General President in conjunction with the General Vice-Presidents.

G. In any locality where there is a superfluous number of Local Unions and a consolidation would be in the best interests of the United Brotherhood, locally or at large, the General President shall have the power to order two or more of such Local Unions to consolidate and to enforce the consolidation, provided such course receives the sanction of the General Executive Board.

H. The General President shall supervise the entire interests of the United Brotherhood, and perform such other duties as the Constitution and Laws of the United Brotherhood may require, and shall by virtue of the office be a delegate to the Conventions of the American Federation of Labor and the Building Trades Department, and shall submit a quarterly report to the General Executive Board, and the same shall be published in the official Journal, and shall also submit monthly, to the General Secretary an itemized account of all moneys expended by the General President on behalf of the United Brotherhood.

I. In case of charges against any General Officer, the General President shall have power to suspend said officer pending an investigation by the

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other members of the General Executive Board, such investigation to take place, and the findings of the General Executive Board, with a copy of all evidence, submitted to a general vote of the Local Unions within thirty days. The result of said vote to be returned to the General President within thirty days thereafter, and should the accused be found guilty as charged by a majority vote of the members of the United Brotherhood voting, the General President shall make the suspension permanent.

J. Where an Auxiliary, Local Union, or District Council, State Council or Provincial Council has asked the assistance of the General Office, the General President may, with the consent of the General Executive Board, make settlement with employers, and the said Auxiliary, Local Union, or District Council, State Council or Provincial Council must accept the same.

K. Whenever, in the judgment of the General President, subordinate bodies or the members thereof are working against the best interests of the United Brotherhood, or are not in harmony with the Constitution and Laws of the United Brotherhood, the General President shall have power to order said body to disband under penalty of suspension. The General President shall have power to grant dispensation for the use of the label, stamp or die, where such will be beneficial to the Organization.

Respondents' Exhibit No. 7—(Continued)

L. The General President shall receive Six Hundred Dollars (\$600.00) per week salary.

First General Vice-President

A. Section 11. The First General Vice-President, under the supervision of the General President, shall render such assistance to the General President as may be required, and by virtue of the office shall be a delegate to the Conventions of the Label Trades Department, A. F. of L., and in case of a vacancy in the office of the General President, shall become General President and perform the duties of that office.

B. The duties of the First General Vice-President, who shall maintain headquarters at the General Office, shall be to examine and approve or disapprove all Local Union, District Council, State Council or Provincial Council Laws, and shall have charge of and issue the label and keep a record of same in accordance with the Constitution and Laws of the United Brotherhood, also keep a record of all union and non-union shops, mills and factories, and their wages, hours, and conditions for the General Office, Local Unions, District Councils, State Councils, Provincial Councils, Representatives, Deputies and Business Agents, and perform such other duties as may be assigned by the General President.

C. In case of charges against the General President, the General Vice-President, in conjunction with the other members of the General Executive Board, shall have power to suspend said officer pending an investigation by the General Executive

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Board and the General Vice-Presidents. And their findings shall be submitted, with a copy of all evidence, by the General Secretary to a vote of all the members of the United Brotherhood within thirty days after the findings are complete, the result of said vote to be returned within thirty days thereafter, and should the accused be found guilty as charged, by a majority vote of all the members of the United Brotherhood voting, the aforesaid officers shall make the suspension permanent.

D. The First General Vice-President shall receive Four Hundred Dollars (\$400.00) per week salary.

Second General Vice-President

A. Section 12. The Second General Vice-President shall render such assistance to the General President as may be required and in case of a vacancy in the office of the First General Vice-President, shall assume that office and perform the duties of same.

B. The Second General Vice-President shall assist the General President in the discharge of the duties of that office and in the absence of the General President and the First General Vice-President from the General Office shall perform the duties of the General President and shall, when not engaged at the General Office, devote full time to the interest of the United Brotherhood under the direction of the General President.

C. The Second General Vice-President shall receive Three Hundred and Fifty Dollars (\$350.00) per week salary.

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General Secretary

A. Section 13. The General Secretary shall preserve all important documents, papers and letters and retain copies of all important letters sent on business of the United Brotherhood, and shall conduct all official correspondence pertaining to the office and sign all charters, if in proper order, also have charge of the seal of the United Brotherhood, and shall affix it to all important official documents; keep a record of all contributing members of the United Brotherhood, also those owing three months' dues, dropped, deceased, resigned, expelled and the cause of expulsion.

B. The General Secretary shall publish the Official Journal on the 15th of each month, giving therein all business pertaining to the Local Unions, and mail a copy of same to the home address of each member who is entitled to donations, and shall also issue the General Password quarterly, and a General Password to the Ladies' Auxiliary semi-annually, and publish a monthly Financial Statement in pamphlet form of all moneys received and expended and the sources from which they have been received, same to be forwarded to the Secretary of each Local Union.

C. The General Secretary shall print the Constitution and Laws of the United Brotherhood in English, and the interpretation of the Constitution and Laws in the English language shall be the only one by which the United Brotherhood shall be governed.

D. The General Secretary shall receive all moneys due from Local Unions and other sources, giving

Respondents' Exhibit No. 7—(Continued)

receipt therefor, and shall keep a correct financial account between the several Local Unions and the United Brotherhood, and draw an order on the General Treasurer for all bills legally due by the United Brotherhood, and also those authorized by the General Executive Board, and shall notify the Local Unions by registered letter when two months in arrears, before the fifteenth day of the third month.

E. The General Secretary shall compile statistics as to the hours of labor, rate of wages, meeting nights, place of meetings, and Saturday half holiday of all Local Unions and District Councils, and make same available to each Local Union, District, State and Provincial Council. The General Secretary shall make an annual report, and shall perform such other duties as are required by the Constitution and Laws of the United Brotherhood.

F. The General Secretary shall daily turn over to the General Treasurer all moneys received, taking a receipt therefor.

G. The General Secretary shall file a bond with the General Executive Board in the sum of Twenty Thousand Dollars (\$20,000.00) for the faithful and honest performance of the duties of the office, and shall employ clerical assistance in the office of the General Secretary at reasonable salaries payable from the General Fund, and shall by virtue of the office be a delegate to the Conventions of the A. F. of L. and Building Trades Department.

Respondents' Exhibit No. 7—(Continued)

H. The General Secretary shall receive Three Hundred Dollars (\$300.00) per week salary.

General Treasurer

A. Section 14. The General Treasurer shall receive from the General Secretary all funds and deposit same in the name of the United Brotherhood of Carpenters and Joiners of America in such banks as may be designated by the General Executive Board, and shall make no disbursements except on order of the General Secretary and signed by the General President, and in case of drawing money from the bank, all checks must be signed by the General Treasurer and countersigned by the General President or General Secretary. The General Treasurer shall submit an itemized statement of all moneys received and expended to the General Executive Board at their quarterly meeting for the preceding three months, and submit to them all books and vouchers pertaining to the office of the General Treasurer for inspection and audit, and shall deliver to the General Executive Board all such books and vouchers when called on to do so. The General Treasurer shall examine and pay all legal claims in accordance with the Laws of the United Brotherhood; order Local Unions to furnish such evidence and information as may be required to render decisions in death and disability claims, and may retain such evidence and papers on file as the case may warrant, but upon the request of the Local Union must furnish it with a copy of the same, and shall perform such other duties as the General

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Executive Board may require, and file a bond with the General Executive Board in the sum of Fifty Thousand Dollars (\$50,000.00) as security for the faithful performance of the duties of the office.

B. The General Treasurer shall receive Three Hundred Dollars (\$300.00) per week salary.

General Executive Board

A. Section 15. There shall be seven districts of the United Brotherhood, and one member of the General Executive Board shall be elected from each district as follows:

B. District No. 1 shall be composed of the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York. District No. 2 shall consist of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia and District of Columbia. District No. 3 shall consist of Kentucky, Indiana, Illinois, Ohio, Michigan and Wisconsin. District No. 4 shall consist of North and South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, Puerto Rico, Canal Zone and Virgin Islands. District No. 5 shall consist of Minnesota, North and South Dakota, Nebraska, Iowa, Kansas, Missouri, Texas and Oklahoma. District No. 6 shall consist of Washington, Montana, Oregon, Idaho, Wyoming, California, Nevada, Utah, Colorado, Arizona, New Mexico, Alaska, British Columbia and Hawaiian Islands. District No. 7 shall consist of the Dominion of Canada, except the Province of British Columbia.

C. The General Executive Board shall be com-

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posed of the General President, First General Vice-President, Second General Vice-President, General Secretary, General Treasurer, and one member from each of the above districts of the United Brotherhood, who between Board meetings shall devote their entire time to the interest of the United Brotherhood, under the supervision of the General President. The General President shall be chairman of the General Executive Board and the General Secretary the secretary; they shall hold quarterly meetings, or when required, and at the call of the chairman of the General Executive Board, special meetings. All correspondence and appeals for the General Executive Board shall be sent to the General Secretary who shall present same at the next regular meeting of the Board. No General Officers shall vote on decisions rendered by themselves. The proceedings of the General Executive Board shall be published in "The Carpenter."

D. The General Executive Board shall decide points of law, all grievances and appeals submitted to them in legal form, and their decisions shall be binding until reversed by the Convention.

E. The General Executive Board shall have power to authorize strikes in conformity with the Constitution and Laws of the United Brotherhood, and when necessary to defend the organization in any locality against the attacks of employers, combinations or lockouts, or any attempt to disrupt or destroy the organization, to support such locality by levying a per capita assessment and by ordering a cessation of work for any employer involved, ir-

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respective of where such work is located; enter into agreement with other organizations with reference to jurisdiction over work; or a general offensive or defensive alliance.

F. Protect the property and interest of the United Brotherhood in such a manner as they may deem helpful and beneficial.

G. Order strikes in any locality, regardless of agreements that may have been entered into by any Subordinate Unions, District, State or Provincial Councils, unless such agreements have been approved by the General President.

H. To make agreements with employers covering our jurisdiction; provided such agreements require employers to conform with the trade rules of the district where the work is located.

I. It shall be the duty of the General Executive Board to prepare the bonds of the General Secretary and General Treasurer, and hold them in trust for the United Brotherhood. They shall employ a licensed State Accountant to make a quarterly audit of the accounts and the books of the General Secretary and General Treasurer, and said Accountant shall be required to submit a written itemized report to the chairman of the General Executive Board. They shall examine all bills and shall perform such other duties as provided for in the Constitution and Laws of the United Brotherhood.

J. Whenever, by virtue of an increased death rate, a deficiency is likely to arise in the General Fund, the General Executive Board shall have the

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authority to draw from the funds of each Local Union such sum for each member in good standing as may provide against such deficiency.

K. The General Executive Board, through the General Office, shall bond all financial officers of subordinate bodies of the United Brotherhood. The cost of said bonds to be paid for by the Local Union, District Council, State Council or Provincial Council. The price of Local bonds shall be a standing appropriation to be paid the General Secretary upon the receipt of notice from the General Office.

L. The General Executive Board shall define a detailed trade autonomy declaration, and as defined, it shall be contained in the Constitution and Laws.

M. The members of the General Executive Board from each district shall receive a salary of Two Hundred and Fifty Dollars (\$250.00) per week.

Board of Trustees

A. Section 16. The General President, First General Vice-President, Second General Vice-President, General Secretary, General Treasurer, and the seven (7) district members of the General Executive Board shall by virtue of their office constitute a Board of Trustees for the management and control of the Headquarters and real estate of the United Brotherhood of Carpenters and Joiners of America in the city of Indianapolis, Ind., the Home and real estate at Lakeland, Florida, or property elsewhere.

B. It shall be the duty of said Board of Trustees to organize and elect a Chairman and Secretary from among their members, and they shall keep a

Respondents' Exhibit No. 7—(Continued)

record of their meetings in a book to be kept for that purpose.

C. The said Board of Trustees shall make a quadrennial report to the General Convention of all business transacted in connection with the Headquarters, Home and real estate of the United Brotherhood of Carpenters and Joiners of America.

D. The said Board of Trustees shall authorize the General President and General Secretary to order the General Treasurer to pay all legitimate expenses in connection with said Headquarters, Home and real estate, subject to examination and approval of the Board when in session.

E. Should a vacancy occur in said Board of Trustees either by death, resignation, removal or otherwise, then such vacancy shall be filled as provided in the Laws of the United Brotherhood.

F. The title of the Headquarters, Home and real estate now held by this United Brotherhood, or which may be hereafter acquired, shall be vested by proper conveyance in said Board of Trustees and their successors in office, to be held by said Board of Trustees in trust for the sole use, benefit and behoof of this United Brotherhood of Carpenters and Joiners of America.

G. Said Board of Trustees shall have the management and control of all property; may rent, lease and improve the same in such manner as the majority of said Trustees shall direct, but shall have no right to sell, convey or encumber any such property without submitting the proposition to sell, convey

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or encumber to a referendum vote; said referendum vote must be taken in accordance with the Laws of the United Brotherhood of Carpenters and Joiners of America, and said proposition must be accepted by a majority of the members voting in order to permit the said Trustees to sell, convey or encumber said Headquarters, Home or real estate, or any part thereof.

H. All legitimate expenditures in connection with said Headquarters, Home and real estate shall be paid by the General Treasurer out of the funds of the United Brotherhood of Carpenters and Joiners of America upon receipt of written order signed by the General President and General Secretary.

I. All income received from rents, lease or sale of said property, or any part thereof, shall be received by the General Secretary as provided for in the Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America, and shall become a part of the General Fund of the United Brotherhood of Carpenters and Joiners of America. An accounting of all such receipts and expenses shall be published in the regular monthly Financial Statement submitted by the General Secretary to the Local Unions. The receipts from the Home Property at Lakeland, Florida, shall be turned over to the Home and Pension Fund.

J. Members of the Board of Trustees, shall receive no compensation for their services in connection with the management of the Headquarters. Home and real estate, other than such compensation as is already provided for in the Constitution and Laws of the United Brotherhood.

Respondents' Exhibit No. 7—(Continued)

Revenue

Section 17. The revenue of the United Brotherhood shall be derived from a per capita tax from all Local Unions on all members in good standing, also \$5.00 on each new Beneficial, Semi-Beneficial and Honorary member admitted excepting First Year Apprentices, the cost of bonds on all subordinate officers, charter fees, rent of office building, interest on bank deposits, subscribers to and advertisements in the official Journal, clearance cards, fines, the sale of supplies and miscellaneous receipts.

GENERAL BY-LAWS

General Convention

A. Section 18. The United Brotherhood shall meet in General Convention quadrennially in September, on a date set by the General Executive Board, and the Board shall provide a suitable place for holding such Convention. The General President, General Secretary and General Treasurer shall act as the Committee on Credentials one day in advance of the Convention.

B. On motion of fifteen (15) Local Unions, no two (2) Unions to be in one State or Province, a Special Convention may be called. Time, place and cause for holding the Convention must be stated in the motion and be approved by a general vote of the United Brotherhood.

C. A Local Union shall be entitled to representation in the Convention for members in good standing on this basis: One hundred (100) members or

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less shall be entitled to one delegate; more than one hundred (100) members and less than five hundred (500), two delegates; more than five hundred (500) members and less than one thousand (1,000), three delegates; one thousand (1,000) or any greater number of members, four delegates.

D. A Local Union shall not be entitled to representation which owes two months' tax to the General Office.

E. The election of delegates and alternates shall be held during the months of June or July preceding the Convention. All members shall be notified by mail to attend the meeting at which the delegates are to be elected. No member shall be eligible as a delegate unless the member is a journeyman, working at or depending on the trade for a livelihood, or employed by the organization and has been twelve consecutive months a member in good standing of the Local Union and a member of the United Brotherhood for three years immediately prior to election, except where the Local Union has not been in existence the time herein required.

F. The Recording Secretary shall, under penalty of Five Dollars (\$5.00) fine, at once report to the General Secretary the name and post office address of the delegate and alternate.

G. Each delegate shall establish claim to a seat by credentials and due book, duly signed by the President and Recording Secretary of the Local Union the delegate represents, with seal of said Union attached.

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H. Each delegate shall be entitled to one vote; no proxy representation shall be allowed. A delegate to the Convention of the United Brotherhood must hold credentials from the Local Union of which the delegate is a member, but several Local Unions can club together, or so can Local Unions in a District Council, and elect a delegate, but the delegate must hold credentials from the Local Union in which membership is held.

I. The mileage and expenses for the attendance of said delegates shall be defrayed by the Local Unions they respectively represent.

J. A quorum for the transaction of business shall consist of a majority of the delegates attending the Convention. Any delegate who refuses to recognize and obey the sound of the gavel in the hands of the presiding officer shall (at the discretion of said presiding officer) be fined the sum of Five Dollars (\$5.00) or be debarred from further voice or vote during the session, and the action taken by the presiding officer shall be reported by the General Secretary to the Local Union which elected the offending delegate as their representative.

K. The Committee on Constitution shall meet fifteen days, and the Committee on Grievances and Appeals five days in advance of the Convention in the city where the Convention is to be held. Members of the General Executive Board shall not be eligible to act on either of these committees.

L. The Committee on Finance shall examine the accounts of the General Secretary and General

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Treasurer, and shall verify the audits made by the General Executive Board, and shall meet ten days in advance of the General Convention.

M. All salaries of General Officers and Representatives shall be fixed by the General Convention, subject to the referendum vote of the membership of the United Brotherhood.

N. The committee to tabulate the votes of General Officers, and all delegates shall be nominated and elected as follows: On the fourth day of the first week of the Convention following the nomination of General Officers, the nomination for the Tabulating Committee and all delegates shall be made. The names of all nominees shall be placed on official ballots supplied by the United Brotherhood, printed under the proper headings, and no other form of ballots shall be considered legal. Election shall be held on the fifth day of the first week of the Convention in regular session, and shall be voted by the delegate marking an (X) cross opposite the name of the nominee to be voted for. The President, unless otherwise ordered, shall appoint five tellers to count the votes, and the nominees, except General Officers, receiving a plurality of all legal votes cast shall be declared elected.

Order of Procedure

Section 19. The order of procedure in Convention in the transaction of business shall be the same as at the preceding Convention until such time as the Committee on Rules reports.

Respondents' Exhibit No. 7—(Continued)

Duties of Officers at Convention

Section 20. The General Officers shall be required to attend the Convention and they shall have a voice in same, and their expenses shall be paid out of the funds of the United Brotherhood.

General President

A. Section 21. It shall be the duty of the General President to preside at all General Conventions of the United Brotherhood and conduct same according to parliamentary rules and in conformity with the laws of the United Brotherhood, and immediately after the opening of the Convention shall appoint a Committee on Rules. After the report of this committee has been acted upon, the General President shall appoint such other committees as may be necessary. Each committee shall consist of five delegates.

B. The General President shall submit to the Convention a quadrennial report.

General Secretary

Section 22. The General Secretary shall keep a correct record of the proceedings of the Convention and shall submit a quadrennial report to the Convention.

General Treasurer

Section 23. The General Treasurer shall submit a quadrennial report to the Convention, showing the total receipts and expenses for the preceding four years.

Respondents' Exhibit No. 7—(Continued)

General Executive Board

A. Section 24. The General Executive Board shall report quadrennially to the Convention.

Board of Trustees

B. The Board of Trustees shall report quadrennially to the Convention.

GENERAL LAWS

Jurisdiction of Local Unions

A. Section 25. Local Unions where no District Council exists shall have the power to make By-Laws and Trade Rules which in no way conflict with the Constitution and Laws of the United Brotherhood, and must be approved by the First General Vice-President before becoming law, and shall be filed with the First General Vice-President; likewise all future amendments must be submitted and filed.

B. Local Unions shall have power to regulate and make payment of sick donations only by an established By-Law of the Local Union.

C. A Local Union cannot withdraw from the United Brotherhood or dissolve so long as ten members in good standing object thereto, but shall consolidate with an other Local Union on order of the General President with sanction of the General Executive Board or by a majority vote of each Union at a special called meeting after paying up all indebtedness to date of consolidation.

D. In communities where there are not a sufficient number of journeymen carpenters or persons

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eligible to membership in the United Brotherhood to form a Local Union, the Representatives, or some other person designated by the General President, shall have the power to initiate members in such localities, provide such members with Due Books, Constitutions, etc. Members so initiated shall be under the jurisdiction and shall pay dues to the nearest Local Union to the locality in which they reside, until such time as there are sufficient eligible persons in their locality to form a Local Union.

E. Each Local Union is responsible for the carelessness or negligence of its officers.

F. All Local Unions are prohibited from sending out circulars or appeals asking for financial aid in any form, except by and with the approval of the General Executive Board, attested by the General Secretary.

Jurisdiction of District Councils

A. Section 26. Where there are two or more Local Unions located in one city they must be represented in a Carpenters' District Council, composed exclusively of delegates from Local Unions of the United Brotherhood, and they shall be governed by such Laws and Trade Rules as shall be adopted by the District Council and approved by the Local Unions and the First General Vice-President. The General President shall have power to order such Local Unions to affiliate with such District Council, and to settle the lines of jurisdiction of such District Council, subject to appeal.

B. District Councils may be formed in localities

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other than in cities where two or more Local Unions in adjoining territory request it, or when in the opinion of the General President the good of the United Brotherhood requires it. The District Council so formed shall be governed by the same General Laws governing District Councils in cities.

C. District Councils shall have the power to make By-Laws, Working and Trade Rules for the government of the Local Unions and the members of the United Brotherhood working in their districts. Also, Laws governing strike and other donations except sick donations, which shall in no way conflict with the Constitution and Laws of the United Brotherhood, and must be adopted by a referendum vote of the members of the Local Unions affiliated with the District Council and approved by the First General Vice-President before becoming law, and their representation shall be according to membership.

D. The jurisdiction of the District Council shall be as provided for by the Constitution and Laws of the United Brotherhood and named in their charter.

E. District Councils shall have the power to hold trial for all violations by members or Local Unions and impose such penalties as they may deem the case requires, subject to the right of appeal under Section 57. The decision of the General Executive Board on violations of Trade Rules is final. District Councils cannot debar their members from working for contractors or employers other than those connected with the Employers' or Builders' Associa-

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tion, nor shall they affiliate with any central organization whose Constitution or By-Laws conflict with those of the United Brotherhood.

F. Local Unions other than those working on building material shall not have a voice, vote or delegate in any District Council of the building tradesmen, but may establish District Councils of their own under By-Laws approved by the First General Vice-President.

G. Examining Boards may be established by District Councils or Local Unions where no District Council exists. They shall examine candidates as to their qualifications for membership in the United Brotherhood and must report their findings on all applicants in writing. The examinations shall consist of a practical test in the branch of trade in which the applicant desires employment.

Jurisdiction of State and Provincial Councils

A. Section 27. State and Provincial Councils may be formed voluntarily by Locals or Ladies' Auxiliaries of this United Brotherhood, which may have power to adopt, by a referendum vote, such laws as will assist in organizing and strengthening the Locals of their respective States and Provinces. All Laws of State and Provincial Councils must be submitted to the First General Vice-President for approval, and all officers and members of such Councils shall be held responsible for compliance with all Laws governing the United Brotherhood. Where State or Provincial Councils are organized, composed of as many as five (5) Local Unions of the

Respondents' Exhibit No. 7—(Continued)

State or Province, representing 55 per cent of the membership, it shall be obligatory on all Local Unions to affiliate with said Council.

B. State and Provincial Councils shall have the power to make laws to govern such State and Provincial Councils, which shall in no way conflict with the Constitution and Laws of the United Brotherhood, and must be adopted by referendum vote of the members and approved by the First General Vice-President before becoming law.

C. The jurisdiction of State or Provincial Councils shall be the State or Province for which they are chartered, unless otherwise provided in the Constitution and Laws of the United Brotherhood.

Jurisdiction of Auxiliary Unions and District

Councils

A. Section 28. The jurisdiction of Auxiliary Unions or District Councils shall be as provided for by the Constitution and named in their charter.

B. Auxiliary Unions may make laws to govern their members in the same manner as Local Unions, and may form Auxiliary Councils in their jurisdiction, but in no case shall members of Auxiliary Unions be allowed to work outside of the jurisdiction covered by their charter, or allowed to transfer to a Local Union of the United Brotherhood, without taking an examination as to their knowledge of the trade and paying the initiation fee of said Local Union.

C. Any member in good standing is permitted to become a member of a Ladies' Auxiliary Union.

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Admission of Local Unions

A. Section 29. A Local Union may be organized by ten or more applicants who must apply to the General Secretary and send Fifteen Dollars (\$15.00) for outfit necessary for the institution of their Local Union. Then the General Secretary shall forward charter and complete outfit, provided the applicants are qualified, according to the Constitution and Laws of the United Brotherhood. The outfit shall consist of the following articles: Seal, Ritual, Gavel, minute book, ledger, day book, Treasurer's cash book, Recording Secretary's order book, Financial Secretary's receipt book, Treasurer's receipt book, pad of official letterheads, pad of applications, twenty-five Due Books and twenty-five Constitutions. The Charter is at all times the property of the United Brotherhood.

B. More than one Local Union may be chartered in the same city, provided no reasonable objections are offered by the Local Union or District Council in said locality.

C. All business of this United Brotherhood at meetings of Local Unions shall be recorded in the English language, and it shall be the duty of the General President to revoke the charter of any Local Union within the United States that fails to comply with this section.

Suspended and Lapsed Local Unions

A. Section 30. If at any time a Local Union should withdraw, lapse, dissolve, be suspended or expelled, all property, books, charter and funds held

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by, or in the name of, or on behalf of said Local Union must be forwarded immediately to the General Secretary, to be held in safe-keeping for the United Brotherhood as Trustee for the carpenters in that locality until such time as they shall re-organize.

B. The officers and members of said Local Union will be held responsible for compliance with the above section within thirty days after such dissolution, suspension or withdrawal, under penalty of being prosecuted by law, and forfeiture of membership and donation in this United Brotherhood.

C. A member of a lapsed or suspended Local Union, if in good standing, can take a clearance to the nearest Local Union in the vicinity, upon application to the General Secretary, who shall issue same. Said clearance can be sent by mail to the nearest Local Union and can be accepted without requiring the personal attendance of the member.

Local Officers

A. Section 31. The officers of a Local Union shall be a President, Vice-President, Recording Secretary, Financial Secretary, Treasurer, Conductor, Warden and three Trustees. Seven members shall constitute a quorum.

B. All officers shall serve for a term of one year, or until their successors are elected, qualified and installed, with the exception of the Trustees, who shall be elected in such manner that the term of one Trustee shall expire annually. Neither the Presi-

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dent, Treasurer, Financial Secretary nor Recording Secretary can act as Trustee.

C. The nomination of Local Officers shall take place on the first regular meeting night in June, but may be reopened the night of election, except when the Australian ballot is used.

C. A member cannot hold office nor be nominated for office, delegate or committee unless present on the night of nomination, except that the member is in the ante room on business authorized by the Local Union or out on official business, or prevented by accident or sickness from being present; nor shall the member be eligible unless a journeyman working at the trade or employed by the organization and has been twelve consecutive months a member in good standing in the Local Union and a member of the United Brotherhood of Carpenters and Joiners of America for three years immediately prior to nomination, unless the Local Union has not been in existence the time herein required. Honorary members are not eligible to hold office.

E. The election of all local officers shall be by ballot, and it shall require a majority of all votes cast to constitute an election, but any Local Union may elect its officers by the Australian ballot system, and the nominees receiving a plurality of votes shall be declared elected.

F. When there are more than two candidates for the same office, at every unsuccessful balloting the one receiving the lowest number of votes shall be

Respondents' Exhibit No. 7—(Continued)

dropped, the voting to then continue until one has secured a majority unless the election is held under the Australian ballot system; then the nominee receiving a plurality of votes cast shall be declared elected.

H. At all elections of local officers the presiding officer shall appoint two tellers and shall then announce the names of the candidates in rotation, and a vote shall be taken.

H. The tellers shall then collect and count the ballots cast in the presence of the meeting. The Recording Secretary shall act as Clerk of Election, and shall take charge of the ballots and preserve the same until after the installation of officers. The presiding officer shall declare the result of the ballot and announce the name of the elected candidate.

I. The election of officers shall take place on the second meeting night in June, and all members shall be notified by mail to attend the meeting at which the officers are to be elected.

J. The installation of officers shall take place on the first meeting night in July. In case an officer does not appear for installation within two regular meetings thereafter, the office must be declared vacant.

Vacancies in Local Offices

A. Section 32. Of any officer shall fail to discharge the duties of the office for three successive meetings without satisfactory excuse, the office shall be declared vacant by the President, and an election

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to fill the same shall take place at the next stated meeting.

B. Vacancies occurring in any office of the Local Union shall be filled at the next regular meeting, in the same manner as provided for in the election of officers. During the temporary absence of any officer, the President shall appoint a member to fill the vacancy pro tem.

C. Any officer of the Local Union may be removed after due trial upon charges preferred, and sustained by a majority vote of the members present.

D. In the absence of both the President and the Vice-President, the Recording Secretary shall call the meeting to order, and the Local Union shall elect a President pro tem.

Duties of President

A. Section 33. The President shall preside at all meetings, preserve order and enforce the Constitution and Laws of the United Brotherhood; shall decide all questions of order, subject to an appeal of the Local Union. The President shall have the deciding vote in case of a tie, and shall sign all orders on the Treasurer authorized by the Local Union.

B. The President shall appoint all committees or such other officers as may be necessary, unless otherwise ordered, and shall have power to order the Recording Secretary to call special meetings when requested in writing by five (5) members in good standing, and shall perform such other duties as are required by the office.

Respondents' Exhibit No. 7—(Continued)

Duties of Vice-President

Section 34. The Vice-President shall assist the President in the discharge of the official duties and shall fill the office in case of absence, death, removal or resignation of the President, until such time as a President is elected.

Duties of Recording Secretary

A. Section 35. The Recording Secretary shall keep the correct minutes of each meeting, read and preserve all documents and correspondence, issue all summons for special meetings, have charge of seal and affix the same on all official documents, draw and sign all legal orders on the Treasurer and conduct all official correspondence.

B. The Recording Secretary shall keep a record of all applications for membership, send a list of the names and addresses of all new officers to the General Secretary, also all changes, and report to the Local Union the expenditures at the close of each meeting, and perform such other duties as the Local Union may direct, or as prescribed in the Constitution and Laws of the United Brotherhood.

C. The Recording Secretary shall notify all members of the Local Union to present their due books to the Trustees during the first month of each quarter for the purpose of comparing them with the books of the Financial Secretary. A fine of not less than Twenty-Five Cents (25c) shall be imposed on each member who fails to comply with this section.

Duties of Financial Secretary

A. Section 36. The Financial Secretary shall receive all moneys paid into the Local Union and im-

Respondents' Exhibit No. 7—(Continued)

mediately make entry of same in the Day Book and shall at the close of each meeting, pay the same to the Treasurer, who shall give a receipt for money received. The Financial Secretary shall keep a correct account of each member, with full name and address.

B. The Financial Secretary shall enter and date each payment on the member's Due Book, and sign the same, and shall enter in the Ledger the exact date and full amount of each payment and shall record in the Day Book all receipts and report same to the Local Union.

C. The Financial Secretary shall not accept dues from any member working or residing in another district unless said dues are accompanied with a statement from the Business Agent or Secretary of the Local Union or District Council that the member is complying with the rules of the locality where the member resides or is employed. The Financial Secretary shall not receive the dues of members in the interim between meetings. After the last meeting night in the month the Financial Secretary shall receive dues at home or office up to and including the last day of the month.

D. The Financial Secretary shall make a quarterly report to the General Secretary on the official forms furnished for that purpose; said report must be sent to the General Secretary not later than the tenth day of January, April, July and October of each year for the quarter preceding, under penalty of \$2.00 fine, and shall report not later than the

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second meeting night of each quarter to the Local Union as to the numerical and financial standing of the Local Union for the preceding quarter, and shall give bond as required by the Constitution and Laws of the United Brotherhood in such amount as the Local Union may decide.

E. Local Unions having an established office and a permanently employed Financial Secretary shall have the power, by regularly passed motion, to designate the books and other property to be kept at the office, and also to delegate such duties to the Financial Secretary as may be deemed expedient for proper transaction of its business.

F. The Financial Secretary shall have full control of all supplies, and shall issue the same, subject to orders of the Local Union.

Duties of Treasurer

Section 37. The Treasurer shall receive from the Financial Secretary all moneys collected and give receipt for and deposit same in the name of the Local Union in such bank or banks as may be designated by the Local Union. The Treasurer shall make no disbursement without the sanction of the Local Union, and only on an order issued by the Recording Secretary and signed by the President.

B. The Treasurer shall make an itemized statement on the first meeting night of each quarter for the preceding quarter, to the Local Union, of all moneys received and paid out, and submit books and vouchers for inspection at any time when called

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upon, and perform such other duties as the Local Union may require.

C. The Treasurer shall send the per capita tax to the General Secretary the first meeting night of each month, for the month preceding, also \$5.00 on each new Beneficial, Semi-Beneficial and Honorary member initiated excepting first year Apprentices. All moneys shall be payable by post office money order, bank draft or express, to the General Secretary, who shall receipt for the same.

D. The Treasurer shall give bond as required by the Constitution and Laws of the United Brotherhood in such amount as shall be fixed by the Local Union as security for the funds and the faithful performance of duties, but shall not at any time be allowed to hold more moneys than the amount of bond covering the office. The Treasurer shall receive a salary of not less than One Dollar (\$1.00) per annum.

Duties of Conductor

Section 38. The Conductor shall examine all present on night of meeting and report to the President all without the Password. The Conductor shall allow no one to remain without the Password and shall obtain the names of all candidates awaiting initiation and report the same to the President and shall conduct the candidate through the initiation ceremony, and shall perform all duties pertaining to the office, and shall be furnished an assistant when necessary.

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Duties of Warden

Section 39. The Warden shall take charge of the doors at the meeting, and see that no one but members with the current quarterly Password shall enter. Members without the Password shall be announced by name and if correct, shall be admitted, and the Vice-President shall furnish them the Password.

Duties of Trustees

A. Section 40. The Trustees shall have the supervision of all funds and properties of the Local Union, subject to such instructions as they may receive from time to time from the Local Union. The title to all property of the Local Union shall be held in the name of the Trustees of the Local Union and/or their successors in office.

B. It shall be the duty of the Trustees to see that the Treasurer deposits in such banks as the Local Union may designate, all moneys over and above such sums as the Local Union may decide shall be left in the Treasurer's hands for contingent expenses or legal bills, instructing the officers of the bank to pay no money on account of the Local Union except on order issued by the Recording Secretary and signed by the President and stamped with the seal of the Local Union.

C. The Trustees shall audit all books and accounts of the Financial Secretary and Treasurer, and examine the bank book of the Treasurer monthly, and see that it is correct, and shall report to the Local Union, in writing, and semi-annually

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to the General Secretary, on forms supplied from the General Office, and shall see that the Financial Secretary and Treasurer are bonded through the General Office, and perform such other duties as are provided for in the Constitution and laws of the United Brotherhood, and perform any other duties their Local Union may direct. The Trustees shall audit all receipts and accounts of any other persons authorized to collect funds.

Duties of Committees

A. Section 41. All committees shall perform the duties assigned to them within the time specified, and shall report in writing, and no person shall be exempt from serving on a committee when called upon, except the Recording and Financial Secretaries, unless excused by vote of the Local Union, or who is already a member of some other committee. No member can be appointed on a committee when absent from the Local Union, unless prevented by accident or sickness from being present.

B. Committees holding money, the property of the Local Union, either as balances or appropriations, shall, at the next regular meeting after completing their work, deliver the same into the hands of the Financial Secretary, together with all vouchers and accounts, and in no case shall a committee be discharged until all bills are paid, and they are reimbursed for their expenses, or paid for time lost, if any, provided the Local Union has originally agreed to do so.

C. The first person named on a committee shall

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be its chairman until another is chosen by the committee.

Qualifications for Membership

A. Section 42. There shall be four types of membership, viz: Beneficial, Semi-Beneficial, Honorary and Auxiliary.

B. Beneficial members are those who are admitted as prescribed by the Constitution and Laws of the United Brother for beneficial members, and who pay the dues provided in the Laws of the United Brotherhood, also the By-Laws of the Local Union.

C. Semi-Beneficial members are those admitted as prescribed by the Constitution and Laws of the United Brotherhood for semi-beneficial members, and pay dues provided by the Laws of the United Brotherhood and the By-Laws of the Local Union.

D. Honorary members are those who join at the age of sixty years or over, or who have received their disability donations and are not entitled to any of the donations prescribed in the Laws of the United Brotherhood, nor shall they be representatives of their Local Union to any other body.

E. Auxiliary members are those who secure membership under auxiliary charters, and are not entitled to the benefits prescribed for Beneficial or Semi-Beneficial Members.

F. A candidate to be admitted to Beneficial or Semi-Beneficial membership in any Local Union of the United Brotherhood must not be less than 17 and not more than 60 years of age and must be an apprentice or journeyman carpenter or joiner,

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Millwright, Railroad Carpenter, Bench Hand, Stair-builder, Furniture Worker, Shipwright, Boat Builder, Reed and Rattan Worker, Under Pinner and Timberman, Pile Driver, Shorer and House-mover, Bridge, Dock and Wharf Builder, Box Maker, Floor Layer and Finisher, Cabinet Maker, Ship Carpenter Joiner and Caulker, Car Builder, Logger, Lumber and Sawmill Worker, and all those engaged in the running of woodworking machinery, or engaged as helpers to any of the above divisions or sub-divisions, or the handling of material on any of the above divisions or sub-divisions.

G. A candidate must be of good moral character and competent to command standard wages.

H. A candidate for membership cannot join any Local Union other than the one in the district in which the candidate is employed unless permission be granted by the Local Union or District Council where employed.

I. A member who has been expelled from any Local Union or by a District Council of the United Brotherhood shall not be eligible for membership in any other Local Union without the consent of the Local Union and District Council with which the Local Union is affiliated, and only then by a majority vote of the members present at a meeting of the Local Union or District Council from which the member was expelled. A candidate who has been rejected for membership in any Local Union or by a District Council shall not again be eligible for membership in any other Local Union or District

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Council except by a majority vote of members present at a meeting of the Local Union or District Council in which the member was rejected.

J. Candidates applying for admission in any Local Union under the jurisdiction of the United Brotherhood, must be citizens of one of the countries included in said jurisdiction, or must furnish proof of their intention to become citizens in the country where they make application for membership. All applications of candidates shall give the date and place of court wherein they took out their first citizenship papers, and after five years from said date if they have not taken out their final papers, they shall be dropped from the roll of the organization.

K. An apprentice of good moral character between the ages of seventeen and twenty-four years may be admitted to membership as a beneficial member and after having completed four years as an apprentice, and qualifying in accordance with the Constitution and Laws of the United Brotherhood shall be advanced to journeyman, and notification of transfer to journeyman shall be forwarded in the next quarterly report to the General Secretary for record. The initiation fee for a first year apprentice shall be not less than \$10.00.

When admitted as 2nd-year apprentice 25% of journeyman fee.

When admitted as 3rd-year apprentice 50% of journeyman fee.

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When admitted as 4th-year apprentice 75% of journeyman fee.

The minimum initiation fee for any apprentice shall be not less than \$10.00.

L. An employer who employs two or more journeymen may have one apprentice, but the number of apprentices may be increased at such rate as the District Council or Local Union having jurisdiction, may decide.

M. All apprentices shall hold agreement between the District Council or Local Union having jurisdiction, and the employer, and any apprentice who can be continuously employed by one employer and who violates such agreement shall be debarred from further membership in the United Brotherhood, unless such apprentice shall have sufficient cause to make complaint to the District Council or Local Union against the employer, and the complaint on investigation is sustained.

N. When an employer cannot provide continuous employment for apprentices and they are obliged to seek work with another employer, they shall have the actual time they work for each succeeding employer entered on their record.

O. District Councils, where such exist, and Local Unions, where there are no District Councils, shall have power to enforce apprentice agreements, to establish a minimum wage scale per week for each succeeding year of the apprenticeship and may extend the term of apprenticeship one year, upon satisfactory proof that the apprentice cannot command the minimum scale of wages paid journeymen.

P. The presiding officer of the District Council

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or Local Union, where no District Council exists, shall appoint a committee of which the Business Agent shall be a member, to be known as the Apprenticeship Committee. The duties of said committee shall be to examine all applicants as apprentices to see that they receive the prevailing scale of wages and fair treatment from employers and have all possible opportunity to secure regular employment. The Committee on Apprentices shall make a quarterly report, showing the number of apprentices in their district, where employed, and the conditions under which they are working. Applicants for apprenticeship between the ages of 16 and 17 years shall be registered with the District Council or Local Union, shall be furnished a recognition card, showing their intention to become members, and shall be given the same attention by the Apprenticeship Committee as apprentices who are members.

Q. The Apprenticeship Committees of all Local Unions and District Councils are urged to call upon their employers and upon their Local Boards of Education, with the view of starting apprentice training classes where technical training may be given apprentices.

R. The First General Vice-President shall compile or have compiled a Standard Manual for the training of apprentices containing mandatory and optional courses of instruction; and shall distribute same to each Local Union and District Council; and shall also direct each Local Union or District

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Council to develop and adopt a set of apprenticeship standards and a system of training apprentices as outlined in the Standard Manual; same to conform with local practices. The Local Union or District Council shall be recognized as the Official Agency for the training of apprentices in its district. An annual report to the First General Vice-President of the number of apprentices in training shall be made by each district.

S. Any member incapacitated by age or accident may be permitted to obtain employment under the regular scale of wages with the consent of the Local Union or District Council.

T. No member of the United Brotherhood shall lump, sub-contract or work at piece work for any owner, builder, contractor, manufacturer or employer. For a violation of this Paragraph or any part of it, the member shall be fined not less than Ten Dollars (\$10.00) or be expelled.

U. Members who contract work or become foremen, must comply with Union rules and hire none but members of the United Brotherhood.

V. No member of the United Brotherhood can remain in or become a member of more than one Local Union, or any other organization of carpenters and joiners, or any mixed union of building tradesmen, under penalty of expulsion. Any member who accepts employment under non-union conditions during the time of a strike or lockout, or being employed as an armed guard during a strike or lockout, shall not be entitled to any donations.

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W. No member of a Local Union shall be eligible to vote for officers, or to vote on wage and working conditions unless such member has been at least twelve consecutive months a member of the Local Union, except where the Local Union has not been in existence the time herein required.

Admission of Members

A. Section 43. A candidate qualified and who desires to become a member of any Local Union of the United Brotherhood must fill out and sign the regular application blank in duplicate and have the same certified to by two members in good standing, as vouchers for the applicant's fitness to become a member. After the application has been initiated, the Financial Secretary shall send the original application to the General Secretary at the close of the meeting. The duplicate shall be filed away by the Recording Secretary for future reference.

B. The application of the candidate must be presented to the Financial Secretary with the full initiation fee, which shall be not less than Ten Dollars (\$10.00) and a sum equal to one month's dues, together with the proportionate part of the dues for the month in which the candidate is initiated, and before the candidate can be obligated, shall lay over one week for investigation, and shall be referred to a special committee of three, who shall in the meantime inquire into the candidate's qualifications to become a member and report at the next regular meeting of the Local Union, making such recommendations as they deem proper, or the can-

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didate may be elected and initiated at the same meeting if the Investigating Committee reports favorably.

C. Upon hearing the report of the committee the candidate shall be notified to appear before the members after which the candidate shall be voted or balloted for, and if elected to membership by a majority vote of members present shall be initiated. The Financial Secretary shall place the name of the new member on the books of the Local Union. The new member shall be supplied with a due book and a copy of the Constitution and Laws of the United Brotherhood and By-Laws and Working Rules of the district.

D. Candidates failing to appear before the members for action on their applications within four weeks after their applications have been presented by the Recording Secretary to the Local Union, shall unless good and sufficient reasons are given in writing to the members present, forfeit any Initiation Fee paid.

E. When a candidate has been rejected for three consecutive meetings in the Local Union in which application was first made, the initiation fee shall be returned to the candidate and the Recording Secretary shall notify the General Secretary of such rejection. The candidate's application shall not again be accepted until six months from the date of rejection.

F. When an applicant for initiation has reached the age of sixty years or over, or who has received

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disability donation, said applicant shall be admitted only as an honorary member at a fee of not less than \$10.00, and shall pay a sum of not less than \$1.00 per month to assist in maintaining the working conditions of the district, and the Local Union shall pay 50c per month to the General Office on each such member to assist in conducting the affairs of the United Brotherhood.

G. Members of foreign bona fide wood-workers' organizations not in arrears in their dues to their home organizations more than three months can be admitted free of initiation fee, but shall be subject to the provisions of the Laws of the United Brotherhood governing donations.

H. A member who owes a sum equal to three months' dues shall not be entitled to the Password, or a seat, or office in any meetings of a Local Union or District Council.

I. Each member will be entitled to all the rights and privileges of this Brotherhood as prescribed in the Constitution and Laws of the United Brotherhood by strictly adhering to the Obligation as prescribed in the Ritual.

J. Members in good standing may visit any Local Union provided they are in possession of the current quarterly Password and membership Due Book.

K. No member shall violate the Trade Rules of the locality in which the member works.

L. No member shall injure another member by undermining such member in prices or wages, nor commit any wilful act by which the reputation of

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the member is injured or employment jeopardized.

M. All business of a Local Union or District Council shall be kept strictly private from persons outside the United Brotherhood unless publication of the same be authorized by a majority vote of members present at a Local Union meeting or a majority vote of the delegates present at a District Council meeting.

N. Any violation of the three preceding Paragraphs, K, L, or M shall be punishable by a fine of not less than Five Dollars (\$5.00) or by expulsion.

O. A member who divulges the quarterly Password for any purpose, other than to enter the meeting, shall be expelled.

P. Each member is required to keep the Recording Secretary and Financial Secretary properly notified of correct place of residence and any change of same under penalty of One Dollar (\$1.00) fine.

Q. A member can remain a contractor, or enter into the business of contracting, providing the member pays the union scale of wages, obeys Trade Rules and hires none but members of the United Brotherhood and complies with the Constitution and Local By-Laws governing contracting members and does not do any lump work, piece work or sub-contracting for a carpenter contractor, and further provided, the member furnishes material and labor on the work contracted for and does not belong to nor become a member of any contractors' or employers' association. Any violation of this rule shall be punished by a fine or expulsion. A contracting member shall

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not be eligible as an officer or delegate of the Local Union or eligible to vote for officers and shall not have a vote on the wage question.

Finances and Dues

A. Section 44. Beneficial and semi-beneficial members shall pay not less than One (\$1.00) Dollar per month dues, Five (5c) Cents of which shall be paid by each of such members as subscription to the official monthly Journal, "The Carpenter," and shall be so applied. No officer or member shall be exempt from paying dues or assessments, nor shall the same be remitted or cancelled in any manner.

B. Monthly dues shall be charged on the books on the first of each month, but a member does not fall in arrears until the end of the month in which the member owes a sum equal to three months' dues.

C. Each beneficial Local Union shall pay to the General Secretary \$5.00 on each new member admitted, excepting first year apprentices, also One (\$1.00) Dollar per month for each member in good standing, Sixty-five (65c) Cents of which shall be used as a fund for the general management of the United Brotherhood and payment of all death and disability donations prescribed by the Constitution and Laws of the United Brotherhood, together with all legal demands made upon the United Brotherhood. The balance of Thirty-five (35c) Cents, together with moneys received from new members, to be placed in a special fund for "home and pension" purposes.

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D. Each semi-beneficial Local Union shall pay to the General Secretary \$5.00 on each new member admitted, also Fifty (50c) Cents per month for each member in good standing which shall be used as a fund for the general management of the United Brotherhood, and payment of all death donations prescribed by the Constitution and Laws of the United Brotherhood, together with all legal demands made upon the United Brotherhood.

E. The per capita tax shall be held as a standing appropriation. An order for the same shall be signed by the President and Recording Secretary without requiring a vote of the Local Union.

F. A member who owes a sum equal to three months' dues must be reported to the General Secretary as being in arrears for the third month, and the per capita tax shall be deducted for that month and the member shall not again be reported until six months in arrears, when the member shall be reported as dropped. If a member pays any part of the arrearages but does not pay for the current month, the members still remains in arrears and shall not be reported by the Financial Secretary in the quarterly report to the General Office. If and when the member squares the arrearages, the Financial Secretary shall report same to the General Secretary giving date when said arrearages were paid (day and month). Payment must include dues for the month in which payment is made and per capita tax for the months from the time when the member was last reported in arrears must be added to the

Respondents' Exhibit No. 7—(Continued)
tax forwarded by the Treasurer to the General Office.

G. A Local Union when three months in arrears to the United Brotherhood or to a District Council shall be suspended from all donations until three months after all arrearages are paid. It is the duty of the members of a Local Union to see that the tax of the Local Union is promptly paid and receipts for the same read at the meetings.

H. A Local Union when six months in arrears to the United Brotherhood or to a District Council is lapsed and can only be reorganized by applying for a charter.

Members in Arrears

A. Section 45. A member who owes the Local Union two months' dues shall be notified by mail at the last known address by the Financial Secretary during the third month of said delinquency that, if said arrearages are not paid before the last day of the third month the member will be suspended from benefits of death and disability donation, the right to a pension or admittance to the Home until the member squares up entirely all of the indebtedness (including dues for the month in which the member squares up the arrearages) and furthermore that the member will not be entitled to any benefits during the time of such arrearages or for a three-month period from the date of squaring up same. A member in arrears must square up all arrearages in full within one year or stand suspended from membership.

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B. Members owing a Local union a sum equal to six months' dues shall have their names stricken from the list of membership without a vote of the Local Union and such members shall be notified at the last known address by the Financial Secretary of the Local Union during the sixth month of said delinquency. An ex-member desiring to rejoin the Brotherhood may be readmitted only as a new member, subject to such readmission fee as provided for in the By-Laws of the Local Union or District Council where application for membership is made. The Local Union readmitting the ex-member shall ascertain the reasons for having been dropped from membership and if dropped for non-payment of dues, shall collect an additional sum of Five Dollars (\$5.00) to be forwarded to the Local Union where membership was formerly held. If, however, said ex-member owed any fines or assessments at the time of being dropped from membership in the Brotherhood, the Local Union readmitting such ex-member shall collect the amount of the indebtedness and forward it together with the sum of Five Dollars (\$5.00) to the Local Union to which the ex-member formerly belonged.

Clearance Cards

A. Section 46. A member who desires to leave the jurisdiction of the Local Union or District Council to work in another jurisdiction must surrender working card and present due book to the Financial Secretary, who shall fill out the clearance card and affix seal thereto. It shall be compulsory, except in

Respondents' Exhibit No. 7—(Continued)

case of strike or lockout, for the Local Union to issue said card providing the member has no charges pending and pays all arrearages, together with current months' dues. Said Clearance Card shall expire one month from date of issue. It shall be optional with the Local Union or District Council to issue Clearance Card in a jurisdiction where a strike or lockout is in effect. A member may leave such jurisdiction without a Clearance Card to seek work in another jurisdiction where no strike or lockout exists, provided the member presents a statement over the seal of the Local Union or District Council in which membership is held, showing that a strike or lockout is in effect in said jurisdiction. The member shall pay the prevailing charge for a Working Permit in the jurisdiction where work is secured.

B. It is compulsory for the member to report and deposit the Clearance Card at the office of the District Council or Local Union where no District Council exists, before securing work, pending a meeting of the Local Union, and comply with all local Laws. And, in no case shall the Financial Secretary accept dues other than to secure Clearance Card from a member working in the jurisdiction of any other Local Union or District Council without the consent of such Local Union or District Council. It shall be the duty of the Financial Secretary accepting dues from a member for Clearance Card who is working in another jurisdiction to immediately report same to the District Council or Lo-

Respondents' Exhibit No. 7—(Continued)

cal Union where no District Council exists under penalty of a fine of Five Dollars (\$5.00) for the first offense, Ten Dollars (\$10.00) for the second offense, and for the third offense suspension from all Local Office for a period of two (2) years.

C. A member who desires to work in another jurisdiction and returns home daily, or who does not desire to transfer membership, shall before going to work, secure a Working Permit in writing from the Local Union or District Council in the jurisdiction where work is secured. The member shall pay for such Working Permit a charge of not less than Seventy-five Cents (75c) per month, nor more than the monthly dues of the Local Union or District Council, and if less than two years a member shall pay any difference in initiation fee, and shall be subject to all local assessments levied exclusively for direct trade purposes by and for the use of the Local Union or District Council.

D. No Local Union shall have the right to collect dues again for the month paid on a Clearance Card. The Local Union issuing the card shall pay to the General Secretary the tax for said member for the month only in which the card is issued, and membership will remain in the Local Union issuing Clearance Card until Clearance Card is deposited in another Local Union, whereupon the member becomes a member of the Local Union wherein said card is deposited.

E. Any General Officer, while employed by the United Brotherhood shall not be required to take

Respondents' Exhibit No. 7—(Continued)

a Clearance Card from the Local Union in which the General Officer holds membership at the time of election or appointment.

F. A member of the Local Union taking out a Clearance Card before two years a member, shall pay, where the initiation fee is higher, into the Local Union accepting the Clearance Card, a sum equal to the difference in initiation fee before the Clearance Card can be accepted.

G. On entering a Local Union a member with a Clearance Card shall present same with Due Book to the President, who shall appoint a committee of three to examine the applicant and Due Book and report at once. If the Clearance Card and Due Book are found correct, and the identity of the member established to whom the Clearance Card is granted, the member shall be admitted to the Local Union as a member thereof, provided there is no strike or lockout in effect in that district.

H. On deposit of said card the Financial Secretary receiving it must sign and affix the seal to the coupon and forward coupon to the General Secretary at the close of the meeting as evidence of its deposit. The Local issuing the Clearance Card shall refund to the member all dues in excess of the current month. The Financial Secretary receiving the Clearance Card shall immediately report the same to the Financial Secretary issuing the Clearance Card under penalty of Five (\$5.00) Dollars fine.

I. A member who re-deposits a Clearance Card

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must present Due Book to the President, who shall require a record of same be made with the Recording Secretary, and the Financial Secretary shall report the return of said Clearance Card to the General Secretary at the close of the meeting.

Resignation of Members

A. Section 47. A member can withdraw or sever his connection with the United Brotherhood by resignation in writing, and it shall require a majority of the members present at a regular meeting to accept a resignation. A member who resigns can only be readmitted as a new member. A member wishing to withdraw or sever connection with the United Brotherhood shall present the resignation in writing, which shall be laid over two weeks for investigation. A member resigning shall be given a Resignation Card, which shall indicate an honorary withdrawal from the United Brotherhood. Such card shall be furnished by the General Secretary on application by the Local Union, on payment of Fifty Cents (50c) for each card.

B. A Local Union shall not accept the resignation of a member when it is known that same has been submitted for the purpose of violating Trade Rules. When a member resigns, or is expelled, or a carpenter as covered by the Constitution and Laws of the United Brotherhood, who works to the detriment of the United Brotherhood, the Local Union or District Council may place a special initiation fee against such person, not to exceed Fifty Dollars (\$50.00) over their regular initiation fee for

Respondents' Exhibit No. 7—(Continued)

new or ex-members as provided for in their By-Laws. No person who engages in the sale of intoxicating drinks can be admitted or retained as a member. Any member engaging in the sale of intoxicating drinks shall forfeit all rights and donations at the time of engaging in such occupation without further notice from the Local Union.

Members Entitled to Donation

A. Section 48. On the death of a member in good standing, if married and living with wife or husband at the time of death, the claim shall be paid to the surviving wife or husband; otherwise the claim shall be paid to the member's legal blood relatives, the estate or undertaker, as prescribed in the Constitution and Laws of the United Brotherhood. A member may change the beneficiary provided the change is made to wife or husband, or blood relative. Such change shall be made on the form to be furnished Local Unions by the General Secretary. The member making a change of beneficiary shall sign the form in the presence of the President and Recording Secretary of the Local Union to which the member belongs, who shall sign as witnesses; provided, however, if said member is not in the jurisdiction of the Local Union to which the member belongs at the time the change is made, then the member can have same sworn to before a Notary Public, or any officer authorized to administer oaths.

B. If a member in good standing dies without leaving any legal heirs, the Local Union shall see the deceased respectably interred. The officers or a

Respondents' Exhibit No. 7—(Continued)

committee of the Local Union shall attend the funeral and the United Brotherhood shall pay the funeral expenses, but in no case shall these expenses exceed the full amount of donation to which the member is entitled at time of death, nor shall the United Brotherhood be held liable for any further donations in the name of the deceased.

C. In the case of any member whose disability or death is caused by intemperance, improper conduct, or by accident or disease incurred previous to joining the United Brotherhood, or by being exposed to risks to which members in their work are not usually liable, neither the member nor any person acting for the member shall have any claims on the United Brotherhood.

D. No claim for donation arising out of any sickness or accident occurring while a member is in arrears shall be allowed.

Beneficial Member's Funeral Donations

A. Section 49. A beneficial member to be entitled to donations must be not less than seventeen and not over sixty years of age at the time of admission to membership, and, when the member joined, must have been in sound health and not afflicted with any disease or subject to any complaint likely to endanger the member's health or cause permanent disability.

B. A beneficial member will be entitled to the donations as prescribed in the Constitution and Laws of the United Brotherhood; provided, the member is over one year a contributing or financial

Respondents' Exhibit No. 7—(Continued)

member in good standing and when owing a sum equal to three months' dues the member shall be debarred from all donations until three months after all arrearages are paid in full, including the current month.

C. Donations for journeymen members between the ages of twenty-one and fifty years shall be:

One year's membership	\$100.00
Two years' membership	200.00
Three years' membership	300.00
Four years' membership	400.00
Five years' membership or more...	600.00

D. An apprentice or a candidate between the ages of fifty and sixty years of age when admitted to membership shall be entitled to the donations on condition and they have been a member the required length of time and that they were in good health at the time of their initiation, and in good standing at the time of death, provided however, they are over two years contributing or financial members in good standing, and when owing a sum equal to three months' dues they shall be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made. They shall not be entitled to husband or wife funeral donations or disability donations.

E. Donations for apprentices and members admitted between the ages of fifty and sixty years shall be:

Respondents' Exhibit No. 7—(Continued)

Two years' membership	\$ 50.00
Three years' membership	100.00
Five years' membership	150.00
Ten years' membership	250.00

Husband or Wife Funeral Donation

A. Section 50. A beneficial member between the ages of twenty-one and fifty years at the time of admission to membership, or a member who has been transferred from the classification of apprentice to journeyman, lawfully married, shall, on the death of the husband or wife, be entitled to the husband or wife funeral donation as prescribed in the Constitution and Laws of the United Brotherhood, on condition that the husband or wife was sound in health at the time of admission to membership; provided however, that a member owing a sum equal to three month's dues, shall be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made.

B. An applicant eligible to beneficial membership, if married, whose husband or wife is in ill health, may be admitted, but in the event of death shall not be entitled to the husband or wife funeral donation. Should the husband or wife be sick at the time of joining the Local Union, then said husband or wife shall, after they become well, be examined by a physician, who shall furnish a certificate of health to the Local Union.

C. All rules and provisions as to health and conduct applying to a claim for a member's funeral do-

Respondents' Exhibit No. 7—(Continued)

nation shall apply to the claim for a husband or wife funeral donation for one husband or wife only. If however, both husband and wife are beneficial members, in the case of death of either, the survivor shall not be entitled to any donations other than those specified in Section 49.

D. The husband or wife funeral donation shall be:

One years' membership\$ 50.00

Two years' membership 100.00

Three years' membership or more .. 150.00

Disability Donations

A. Section 51. A beneficial member, not less than twenty-one and not more than fifty years of age at the time of admission to membership, or a member who has been transferred from the classification of apprentice to journeyman, in good standing, who becomes permanently disabled for life by accidental injuries received not less than one year after becoming a member, and is thereby totally incapacitated from ever again following the trade for a livelihood, shall be entitled to a disability donation as prescribed in these Laws provided, however, when the member owes a sum equal to three months' dues, the member shall be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made. Payment of disability donation shall relieve the United Brotherhood from any further obligation and upon the payment of the claim the Financial Secretary shall strike the member's name from the books, and such member shall be eligible

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for readmission in any Local Union of the United Brotherhood, but only as an honorary member.

B. A permanent disability claim must be filed with the General Treasurer within two years from the date of the accident. Failure to do so shall invalidate the claim.

C. Permanent disability shall consist of total blindness; the loss of an arm or leg, or both; the total disability of a limb; the loss of four fingers of one hand; or being afflicted with any physical disability resulting from accidental injuries.

D. Whenever such disability has occurred through actual negligence, or the use of alcoholic drinks on the part of the disabled member, such member shall not be entitled to donations.

E. In all claims for disability donations the claimant shall be carefully and thoroughly examined by two competent and reputable physicians selected by the Local Union, and they shall send a certificate in writing to the Local Union as to the nature and extent of the disability and their opinion whether the claimant is totally disabled for life within the meaning of this section. The expenses of said examination shall be paid by the Local Union and the report of said physicians shall be sent to the General Treasurer.

F. When a beneficial member, not less than twenty-one and not more than fifty years of age at the time of admission to membership, or a member who has been transferred from the classification of apprentice to journeyman in good standing, meets with accidental injuries which might

Respondents' Exhibit No. 7—(Continued)

totally and permanently disable the member from ever again following any branch of the trade for a livelihood, any member shall report the accident to the Local Union within thirty days from the date of the accident and the Local Union shall appoint a committee to visit the member and secure from such member a detailed statement in writing as to how, when, and where the accident happened, the names of witnesses, if any, and retain same on file pending possible future claim for disability donation. The amount of disability donations shall be computed from the date of initiation to the date of accident.

G. The disability donation shall be:

One year's membership	\$ 50.00
Two years' membership	100.00
Three years' membership	200.00
Four years' membership	300.00
Five years' membership or more ..	400.00

Semi-Beneficial Members' Donation

A. Section 52. Candidates who are less than sixty (60) years of age when admitted to membership in a semi-beneficial Local shall be entitled to the donations provided for semi-beneficial members on condition that they have been members the required length of time, that they were in good health at the time of their initiation, and in good standing at the time of death, provided, however, they are over two years contributing or financial members in good standing, and when owing a sum equal to three months' dues they shall be debarred from all donations until three months after all arrearages

Respondents' Exhibit No. 7—(Continued)

are paid in full, which payment must include the payment of dues for the month in which the payment is made. They shall not be entitled to husband or wife funeral donations or disability donations.

B. Semi-beneficial members' donations shall be:

Two years' membership\$ 50.00

Three years' membership 100.00

Five years' membership or more .. 150.00

Presentation and Payment of Claims

A. Section 53. When death or disability occurs, the person applying for donation shall present to the Local Union concerned a certificate of the facts from the attending physician, and, if approved by the Local Union, the same shall be forwarded by the Financial Secretary to the General Treasurer, with the claim certificate of the United Brotherhood, properly filled out, and shall send all other papers required.

B. All death claims must be filed with the General Treasurer within six months from date of death, failure to do so shall invalidate the claim. If a claim is disapproved by the General Treasurer, the party or parties shall have the right to appeal to the General Executive Board any time within six months from the date of disapproval and, if still dissatisfied, shall have the right to appeal any time within two years from date of decision by the General Executive Board to the next General Convention.

C. Upon receipt of a claim, the General Treasurer shall investigate the same and, if approved shall at once forward to the Financial Secretary a bank

Respondents' Exhibit No. 7—(Continued)

totally and permanently disable the member from ever again following any branch of the trade for a livelihood, any member shall report the accident to the Local Union within thirty days from the date of the accident and the Local Union shall appoint a committee to visit the member and secure from such member a detailed statement in writing as to how, when, and where the accident happened, the names of witnesses, if any, and retain same on file pending possible future claim for disability donation. The amount of disability donations shall be computed from the date of initiation to the date of accident.

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One year's membership	\$ 50.00
Two years' membership	100.00
Three years' membership	200.00
Four years' membership	300.00
Five years' membership or more ..	400.00

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Respondents' Exhibit No. 7—(Continued)

are paid in full, which payment must include the payment of dues for the month in which the payment is made. They shall not be entitled to husband or wife funeral donations or disability donations.

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B. All death claims must be filed with the General Treasurer within six months from date of death, failure to do so shall invalidate the claim. If a claim is disapproved by the General Treasurer, the party or parties shall have the right to appeal to the General Executive Board any time within six months from the date of disapproval and, if still dissatisfied, shall have the right to appeal any time within two years from date of decision by the General Executive Board to the next General Convention.

C. Upon receipt of a claim, the General Treasurer shall investigate the same and, if approved shall at once forward to the Financial Secretary a bank

Respondents' Exhibit No. 7—(Continued)

check or draft for the amount of the donation due and payable to the person entitled to receive it.

D. Any officer, member or Local Union making use of improper means to obtain donations, or who shall make false statements as to age or health, or knowingly present or sign any claim of a fraudulent character for donations, upon proof thereof, may be fined, suspended or expelled from the United Brotherhood.

Home and Pension

A. Section 54. A member shall not be less than sixty-five years of age to be eligible to the Home or Pension.

B. A member shall hold continuous membership for not less than thirty years.

C. The traveling expenses of a member whose application for admittance to the Home has been approved by the proper authorities shall be paid by the Local Union in which membership is held.

D. Members not wishing to avail themselves of the privilege of entering the Home may apply for a Pension not to exceed \$15.00 per month, payable quarterly.

E. Members applying for the Pension must apply for same through the Local Union in which they hold membership on forms furnished by the General Office.

F. No pension will be paid until an application has been properly filled out by the Local Union in which applicant holds membership and same has been approved by the General President.

G. Payment of Pension will be made at the be-

Respondents' Exhibit No. 7—(Continued)

ginning of the calendar quarter following approval of the application.

H. A member who qualifies under Paragraphs "A" and "B" of this Section and who receives State aid in those states where the amount of Pension paid by the Brotherhood is deducted from the amount of State pension, shall apply through the Local Union for a paid-up life membership, thereby relieving the member from paying further dues, and the Local from paying per capita tax to the United Brotherhood.

Misdemeanors and Penalties

A. Section 55. Any officer or member who becomes a habitual drunkard, or is guilty of improper conduct, or wrongs a fellow-member, or defrauds him, or commits an offense discreditable to the United Brotherhood, shall be fined, suspended or expelled.

B. Any officer or member who endeavors to create dissension among the members or works against the interest and harmony of the United Brotherhood, or who advocates or encourages division of the funds or dissolution of any Local Union, or the separation of a Local Union from the United Brotherhood, or embezzles the funds, shall be expelled and forever debarred from membership in the United Brotherhood.

C. An officer or member who wilfully slanders an officer or member of the United Brotherhood, or violates the Trade Rules of the locality in which the member is working, or fraudently receives or attempts to misapply the money of any Local Un-

Respondents' Exhibit No. 7—(Continued)

ion, or of any member or candidate intrusted to such member for payment, shall be fined, suspended or expelled, as the Local Union may decide.

D. Any officer or member who furnishes a list of membership of the Local Union to any person outside of the United Brotherhood, without first getting consent of the Local Union, shall be fined not less than Ten Dollars (\$10.00) or expelled, as the Local Union may decide.

E. Any officer or committeemen who neglects or fails to perform any duty required by the Constitution and Laws of the United Brotherhood shall be fined.

F. Any member entering the meeting in a state of intoxication, or who disturbs the harmony thereof or uses profane or unbecoming language during the meeting shall be admonished by the Chair, and, if the member again offends, shall be fined fifty (50c) cents; for the second offense, one dollar (\$1.00) and excluded from the room; for the third offense the member shall be suspended for three months. A visiting member shall be subject to these Laws, and fines shall be payable to the Local Union where the offense is committed. The President shall strictly enforce this section.

G. The President shall impose all fines as laid down by the Constitution and Laws of the United Brotherhood.

H. All fines imposed and assessments legally levied shall be charged by by the Financial Secretary to the member from whom due, and shall stand against the member as regular dues and must be

Respondents' Exhibit No. 7—(Continued)

paid with thirty days to entitle the member to any privilege, rights or donations of this United Brotherhood. Members working during a strike must pay a strike assessment if levied.

I. All fines imposed by any Local Union or District Council on a member of an outside district shall be charged and collected from the member by the Local Union and forwarded to the District Council or Local Union where violation of rules occurred, under penalty of suspension.

J. A Local Union may fine any member who refuses to parade on Labor Day.

K. A fine can be remitted or reconsidered only by a majority vote of the members present at the same or next meeting.

L. Any member who acts in violation of the Obligation, or violates any Section of the Constitution and Laws of the United Brotherhood shall be fined, suspended or expelled, at the discretion of the Local Union or District Council, except where the penalty is specified in the Laws.

Charges and Trials

A. Section 56. A member must be charged and tried within the jurisdiction of the Local Union or District Council where the offense was committed, where a District Council exists all charges shall be tried before that body. A copy of the verdict must be sent to the Local Union where the member belongs. Any Local Union may suspend a member by a majority vote until charges can be preferred and the member is regularly tried. A member must

Respondents' Exhibit No. 7—(Continued)
exhaust all resources allowed by the Constitution and Laws of the United Brotherhood before taking a case to the civil courts.

B. All charges must be in writing, and must specify the offense or offenses, and the Section of the Constitution and Laws of the United Brotherhood so violated, and shall be signed by the member or members making such charges.

C. The charges must be read at the meeting and lay over until the next meeting, and the member must be notified by registered mail by the Recording Secretary to be present, and at the same time shall be furnished by the Recording Secretary with a copy of the charges specified. The notice shall be sent to the member's last known address.

D. The member may attend the meeting until convicted of the charges; but if an officer, may be retired from office by the Local Union or District Council while the case is pending.

E. The Local Union or District Council shall nominate the names of eleven members most competent of giving a fair and impartial hearing of the case. The Recording Secretary shall place the names in the ballot box and the Vice-President shall draw the same from the box and call the names aloud until five have been drawn, when the case will be given to them for investigation.

F. All charges shall be referred to a Trial Committee, consisting of five, the accused and the accuser having the alternative of each challenging any three members of said committee. Any member so challenged shall not serve on the committee.

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G. The accused shall have a fair and impartial trial, and shall be allowed until the next regular meeting to appear and reply, either in person or by counsel; the latter must be a member of the United Brotherhood; and, failing to do so, the committee shall proceed with the investigation. All testimony to be taken down in writing. Testimony of persons not members is admissible. The member or members making the charges may be represented by counsel who shall be a member of the United Brotherhood.

H. The chairman of the committee shall without delay, summons the accused in writing, together with all witnesses and try the case.

I. When the committee has come to a decision in the case the chairman of said committee shall, at the next regular meeting thereafter, submit a full report of the case with their verdict and the evidence in writing to the Local Union or District Council.

J. There shall be no debate or review of the case by the Local Union or District Council, except that the defendants and prosecuting witness shall be allowed to plead for, or state their side, and it shall then require a majority of the members present to affix such legal penalty as they deem proper. When found guilty of an offense for which a penalty is fixed by the Constitution and Laws of the United Brotherhood it shall be the duty of the presiding officer to impose such penalty. The report of the

Respondents' Exhibit No. 7—(Continued)
Trial Committee shall be filed by the Recording Secretary for future reference.

K. If the accused wilfully neglects or refuses to stand trial the committee shall deem the member guilty of contempt and the member shall be punished as the Local Union or District Council may determine.

L. Any officer or member who is a party to, or directly interested in any case or trial in a Local Union or District Council, shall not be permitted to act as a member of the committee.

M. Any member who by preaching, advocating or counseling disorder, dissension and disobedience of authority at a Local Union or District Council meeting, after proper charges have been filed and proper notice given within the laws specified by the Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America if found guilty of such charges, shall be guilty of acting in violation of the Obligation and the penalty prescribed therein shall become effective at once.

Appeals and Grievances

A. Section 57. A member who has a grievance or who has had an injustice done in any way, or any Local Union, District, State or Provincial Council having any grievance may appeal to the General President for redress, subject to a further appeal to the General Executive Board, and a final appeal to the General Convention, except violations of Trade Rules; but in no case shall an appeal act as

Respondents' Exhibit No. 7—(Continued)

a stay of proceedings except as provided in the Constitution and Laws of the United Brotherhood.

B. In case a fine is imposed by the Local Union or District Council, and an appeal is taken, said fine shall be held by the body assessing same until said appeal is finally and completely decided.

C. No appeal can be entertained by the General President where any sum of money in excess of Fifty Dollars (\$50.00) is involved unless the appellant has first paid to the Local Union or District Council Fifty Dollars (\$50.00) on account, to be held until the appeal is decided by the General President, and if said appeal is decided against the appellant, the full amount imposed must be paid before a further appeal can be taken. In all cases where the fine is Fifty Dollars (\$50.00) or less the member fined shall pay the full amount to the Local Union or District Council imposing same.

D. Any member or subordinate body of the United Brotherhood desiring to take an appeal shall have such appeal made in duplicate. One copy shall be forwarded to the General President and the other copy served on the member or subordinate body against whom the complaint is made within thirty days after the date of the action or grievance complained of. If an appeal is taken from the decision rendered, a notification of said appeal must be sent to the General President within thirty days after the date of the decision made.

E. When an appeal is taken from the action of a subordinate body there shall be sent to the Gen-

Respondents' Exhibit No. 7—(Continued)

eral President as well as to the appellant in the case, within thirty days, a full and complete copy of the minutes and charges as presented at the trial, together with the answer to the appeal. However, in cases where the act complained of would be in force and effect before the time designated in which to file answer has elapsed the General President is empowered to cause suspension of penalty becoming effective against appellant until answer has been filed and decision rendered.

F. Failing to comply with the above, the General President shall have power to decide the case of appeal on the papers before him. The appellee failing to comply with the above, forfeits all further rights to appeal from action of the General President.

G. All parties to an appeal to the General President are required to go before a Notary Public and make affidavit to the truth of their written or printed statements.

H. All appeals from the decision of the General President to the General Executive Board must be forwarded to the General Secretary within thirty days from the date of receipt of the General President's decision. Also any appeal from the decision of the General Executive Board to the General Convention must be made within thirty days from date of receipt of decision of the General Executive Board.

Funds of Local Unions

General Funds

A. Section 58. The General Funds or property

Respondents' Exhibit No. 7—(Continued)

of a Local Union shall be used only for such purposes as are specified in the Constitution and Laws of the United Brotherhood and as may be required to transact and properly conduct its business, viz.: Payment of salaries and donations to sick members; purchasing stationery, books, cards, printing, payment of rent, or any legally authorized bill against the Local Union. But under no circumstances shall any of the General Funds be used for loans or donations to members, Contingent Fund or for political or religious purposes. Violation of this Section subjects the offending Local Union to the penalty of suspension.

B. No donation for any purpose, except sick donations, shall be given, no tax nor special assessment shall be levied by any Local Union, except by a majority vote of members present, and cannot be declared valid upon the night of its introduction, but must lay over at least two weeks for consideration (except in case of appeals for aid from Local Unions on strike with sanction of the General Executive Board). The Local Union, in the meantime, must notify all members by mail that said donation, tax or assessment is pending.

C. The funds or property of a Local Union cannot be divided in any manner among the members individually, but shall remain the property of the Local Union for its legitimate purpose while ten members remain therein.

D. All moneys paid out of the funds of a Local Union, with the exception of per capita tax and

Respondents' Exhibit No. 7—(Continued)

cost of bonds of financial officers, must be by majority vote of the members present, for which an order must be drawn on the Treasurer signed by the President and Recording Secretary and stamped with the seal of the Local Union. No appropriation of money can be voted after 10:30 p.m.

E. Any Local Union charging more than One (\$1.00) Dollar per month dues may create a special Relief and Contingent Fund for use aside from the General Fund. Local Unions may use all dues in excess of the above dues, all fines levied for non-attendance at special or regular meetings, proceeds of entertainments, and may levy an assessment for said fund in accordance with provisions governing special assessments.

F. This fund may be used for the relief of aged members, organization, or any other purpose the Local Union may decide, except to support a dual organization, for partisan politics, religious purposes, or for any purpose that may be inimical to the interests of the United Brotherhood; provided, however, if property is purchased with said fund the property shall be held in the name of the United Brotherhood of Carpenters and Joiners of America, as specified in the Constitution and Laws of the United Brotherhood.

General Strikes and Lock-Outs

A. Section 59. Strikes inaugurated and conducted according to the following rules may be sanctioned by the General Executive Board and financial aid extended to the extent that the General Executive

Respondents' Exhibit No. 7—(Continued)

Board deems adequate. All trade movements to be first submitted to the General Secretary.

B. Job or shop strikes are to be conducted on rules made by the District Council or the Local Union where a District Council does not exist. A trade demand inaugurated by a Local Union affiliated with a District Council must be endorsed by the District Council and submitted to the General Executive Board for their sanction.

C. Where a District Council exists it shall adopt rules for the government of strikes and lock-outs in that district, as provided for in the Constitution and Laws of the United Brotherhood. When a member from an outside district goes into any city to take advantage of better conditions the member shall take the risk of being called out on strike without pay.

D. Members going to work, without depositing their Clearance Cards in a locality where a strike or lockout is pending, shall be subject to a fine of not less than Twenty-five (\$25.00) Dollars or expulsion. When penalty is imposed the Local Union in which the member holds membership shall be notified, and if fine has been levied same shall be collected and forwarded to the Local Union or District Council having jurisdiction where the offense was committed. If expulsion, the name of the member shall be removed from the membership roll of the Local Union.

E. When any local trade difficulty arises the members aggrieved shall lay the case before their Local

Respondents' Exhibit No. 7—(Continued)

Union or District Council. If said body decides to sustain them, the President of the Local Union or District Council shall appoint a Conference Committee of not less than three capable members to meet with the employer or employers, with a view to adjust the difficulty or dispute.

F. The Conference Committee shall report at the next meeting, and if no settlement has been effected, the Local Union or District Council shall then proceed as prescribed in the Constitution and Laws of the United Brotherhood.

G. When any demand for an increase of wages, reduction of hours or enforcement of Trade Rules is contemplated by a Local Union or District Council each member belonging to the Local Union twelve months or more must be notified by mail to attend a special meeting of the Local Union. Said notice must state the object of the meeting. And any member failing to be present and vote when so notified, unless prevented by sickness or unavoidable accident, shall be fined not less than One (\$1.00) Dollar, or more than Five (\$5.00) Dollars. When a Local Union or District Council decides to take a vote on a trade demand they shall at once apply to the General Secretary for a Schedule of Inquiries.

H. If a majority of eligible members voting, vote by secret ballot to put the proposed demand into effect, the Schedule of Inquiries shall be filled out immediately after the vote is compiled and forwarded to the General Secretary, who shall at once submit a copy of same to the General Executive Board. The

Respondents' Exhibit No. 7—(Continued)

General Executive Board shall not sanction a trade movement unless a majority of such eligible members voting in a Local Union or District Council, vote in favor of the demand.

I. The Schedule of Inquiries must be filed with the General Secretary for submission to the General Executive Board at least sixty days prior to the date the trade demand is to go into effect.

J. The officers of the District Council or Local Union, or a committee elected or appointed from said bodies, shall endeavor to meet with the employers and bring about an adjustment at the earliest possible date, and shall report to the Local Union or District Council not later than the next regular meeting, and each week to the General Secretary, the result of their efforts.

K. The General President, if necessary, may deputize some suitable member to proceed at once to the scene of the difficulty and endeavor to adjust the trouble by negotiation or arbitration. Failing in settlement, the deputy shall submit by telegraph or letter all fact to the General President, and if necessary, the General President shall submit same to a vote of the General Executive Board, who shall send their reply to the General Secretary by telegraph within three days after receipt of said information, under penalty of Ten Dollars (\$10.00) fine.

L. When financial aid has been granted by the General Executive Board to members on strike, the list of members on strike or locked out, must be

Respondents' Exhibit No. 7—(Continued)

submitted to the General Office before financial aid will be allowed by the General Executive Board. The list to be checked up with the membership records at the General Office, and it shall not be payable until the end of the second week, and then only for the second week, to such members as have been on strike or locked out for two full weeks in succession. Members in arrears shall square up their arrearages out of the first strike payment. Only those members who are called out on strike or who are locked out shall be entitled to strike pay.

M. The Treasurer of the District Council, or Local Union where No District Council exists, shall send promptly to the General Secretary at the close of each week a complete financial report, on forms furnished by the General Secretary, of all moneys paid from the funds donated by the General Executive Board. Members receiving strike pay must sign their names on form opposite the amount received and the forms must be countersigned by the Chairman and Treasurer of the Strike Committee and attested to by the Recording Secretary of the Local Union or District Council and have the seal affixed. During the continuance of the strike the Secretary of the Local Union or District Council, or the Secretary of the Strike Committee, shall report at the close of each week to the General Secretary in detail all matters of interest pertaining to the strike. The General Executive Board shall not vote any additional appropriation until the provisions of this Section are complied with.

Respondents' Exhibit No. 7—(Continued)

N. In case of a strike or lock-out, where immediate aid is required, the General President, General Secretary and General Treasurer shall be vested with power to appropriate such sums as, in their judgment, they deem advisable to meet these particular demands, and until such time as the General Secretary can act upon the same through correspondence with the General Executive Board.

O. The General Executive Board shall have power when satisfied from facts and information in their possession that support in a strike or lock-out should cease, to declare the same at an end so far as the financial aid of the United Brotherhood is concerned.

P. In case of a general lock-out of members of the United Brotherhood in any locality, the Secretary of the District Council, or the Local Union where a District Council does not exist, shall immediately mail to the General Secretary a complete statement of the causes leading up to the lock-out. The General Secretary shall submit the same to the General Executive Board, who may appropriate funds for support of the members involved. The rules governing the disbursement of funds appropriated for strikes shall govern all appropriations made by the General Executive Board for support of members locked out.

Q. The General Executive Board shall not extend financial aid to any Local Union engaged in a strike unless said Local Union has been organized for a

Respondents' Exhibit No. 7—(Continued)

period of one year, unless it is affiliated with a District Council that is on strike.

R. Any Local Union or District Council engaging in a general strike without conforming with the above Laws may be suspended.

S. After a trade demand has been approved by the General Executive Board, a majority of the members affected must vote in favor of calling a strike before a strike can be called.

Label

A. Section 60. The attached design of the label shall be the official label of this United Brotherhood:

B. [Cut of Union Label.]

C. The General Office shall, as soon as possible, through the good offices of some District Council or Local Union in each State or Province, have the label registered. Registry to be in the name of the United Brotherhood of Carpenters and Joiners of America and the expense to be borne by the General Office. After such registry, each District Council, or Local Union where no District Council exists, shall apply to the First General Vice-President for sanction to use the label and give such information pertaining to conditions in that district as required, and after receiving sanction from the First General Vice-President, shall issue labels of the above design, with name or number of the District Council or Local Union issuing same, printed in its proper place on the label, to such shops and mills in that

Respondents' Exhibit No. 7—(Continued)

district as are entitled to same, and all labels must be secured from the General Office, which shall furnish them at cost under the following conditions:

D. No agreement shall be made or renewed with any firm granting the use of the label after April 1, 1916, unless all shops and mills of the firm have an eight-hour work-day and employ only members of the United Brotherhood, except where dispensation has been granted by the General President upon application from the District Council or Local Union.

E. Each shop, mill or factory shall have a Shop Steward who shall have supervision over the label, stamp or die; it shall be the duty of the Steward to see that said label, stamp or die shall not be placed on any manufactured article other than that which is made under the agreement. Said label must be applied to the article in the shop or mill where manufactured and must at no time be removed for use from the shop or mill. It shall be the duty of the Shop Steward to see that the agreement with the District Council or Local Union is carried out in its entirety. The members employed in said shop, mill or factory shall hold meetings at least once a month. The Shop Steward must be selected by the Local Union or District Council and serve for the ensuing month.

F. The Shop Steward shall be appointed at the regular monthly meeting for one month; the member working in said shop, mill or factory longest shall serve first.

Respondents' Exhibit No. 7—(Continued)

G. Under no circumstances shall an employer be permitted to handle labels or have them in charge, nor shall anyone but a member of the United Brotherhood be permitted to attach them, and the Shop Steward shall at all times keep them securely locked up, so that no one else may have access. All labels shall be attached to finished product by members of the United Brotherhood in such a manner that they cannot be removed therefrom without destroying the label.

H. Each label shall have the factory, shop or mill number stamped thereon. Whenever a label is applied without the factory number thereon it shall be regarded as forged. The factory number, in conjunction with the name of the District Council or Local Union issuing said label, will thus permit recognition of the product of any particular factory in any part of the jurisdiction of the United Brotherhood.

I. It shall be the duty of the Secretary of each District Council or Local Union issuing labels to keep a correct and accurate account of all labels received from the General Office, their numbers and the shops to which they have been issued, and to furnish all information regarding the use of the label which may be called for by the District Council or the First General Vice-President.

J. The Shop Steward shall receive and account for the use of the labels and make a report to the District Council or Local Union monthly, or oftener if required, and to the First General Vice-Presi-

Respondents' Exhibit No. 7—(Continued)

dent upon request. Shop Stewards failing to report as required by the District Council or Local Union shall be fined.

K. Upon request of the First General Vice-President, a representative shall be sent to investigate the conditions of any mills using the label, and upon receipt of report the General President shall furnish a copy of same to the First General Vice-President.

L. In case of any violation of agreement or grievance against an employer, the label shall be withdrawn when ordered by the First General Vice-President.

M. The First General Vice-President, with the sanction of the General Executive Board, shall have the power to order the withdrawal of the label from any factory, shop or mill, upon charges duly made, and shall have power to regulate and investigate the issuance of the label in accordance with the Constiution and Laws of the United Brotherhood.

N. It shall be the duty of all District Councils, Local Unions and each member to promote the use of trim and shop-made carpenter work, hotel, bank, bar, store and office fixtures, and of church, school, household furniture, etc., and to make it generally known to the members of the Local Union that it is necessary to all mill and shop members and the United Brotherhood that products made in factories, shops or mills where only members of the United Brotherhood are employed should be installed by fellow-members.

O. Where owner or architect specifies that union

Respondents' Exhibit No. 7—(Continued)
materials shall be used on any job or building, none other shall be handled by the membership of our Brotherhood, under penalty of suspension from the United Brotherhood.

P. For misuse of the Union Label the Shop Steward shall be fined Twenty-five Dollars (\$25.00) for the first offense, and for the second offense shall be expelled.

Supplies for Local Unions

Section 61. All Constitutions, cards and supplies shall be furnished by the General Secretary, per order of the Financial Secretary of any Local Union in good standing, and the money for the same shall be sent to the General Secretary and shall accompany all orders for supplies.

Affiliations

A. Section 62. Being affiliated, as an International Body, with the American Federation of Labor, it is the duty of all Local Unions to affiliate with Central Bodies and State Federations of the American Federation of Labor.

B. By vote of the members of the Local Unions in Canada, under date of February 27, 1907, it was decided that all Local Unions in Canada affiliate with the Canadian Trades and Labor Congress, tax to be paid to the Congress direct from the General Office.

General Vote

A. Section 63. Whenever a general vote of the members is taken, a statement shall be submitted

Respondents' Exhibit No. 7—(Continued)

along with it by the parties sending it out, giving their reasons why such amendment shall become a law, and the General Secretary shall state the number and location of the Locals that have endorsed same. It shall require a majority vote of the members voting to decide, and said general vote, under Seal of the Local Union, shall be returnable to the General Secretary within six weeks from date of circular calling for the vote, and the result, pro and con, in each Local Union shall be published in pamphlet form, containing a copy of amendment or amendments voted on and distributed to all Local Unions in the same manner as the monthly Financial Statement. Any Local Union may submit an amendment to the Constitution and Laws of the United Brotherhood. The proposed amendment must be sent to the General Secretary, who shall publish it in "The Carpenter" one month prior to the next regular meeting of the General Executive Board, and if approved by that body, it shall be submitted to a general vote. If the amendment is endorsed at a called meeting for that purpose, by twenty-five (25) Local Unions in as many States, approval of the General Executive Boards shall not be required.

B. At any time the General Executive Board deems a new law or amendment is necessary to govern the United Brotherhood, they may recommend a clause to the Local Unions to be voted on; and should a majority vote of the members voting support the recommendation, it shall become a law.

Respondents' Exhibit No. 7—(Continued)

No new laws or amendments shall be submitted for a vote of the Local Unions between Conventions in which the result of such vote would not become a law six months prior to the holding of the General Convention.

C. The Constitution and Laws herein contained can be amended or altered at regular sessions of the Convention by a majority vote of the delegates present, and all such amendments or alterations must be submitted by the General Secretary, within twenty-five days after the Convention adjourns, to the Local Unions for a general vote. A majority vote of the members voting shall be necessary to sustain such amendments or alterations to make them law.

D. All amendments to the General Constitution submitted by Local Unions, District, State or Provincial Councils for the consideration of the Convention shall be forwarded to the General Secretary not later than the 15th day of July preceding the holding of the Convention, and the said amendments shall be published in our Official Journal in the issue immediately following their receipt by the General Secretary, and no further amendments shall be considered by the Constitution Committee other than those submitted in accordance with the above, but amendments to any Section can be offered from the floor during the report of the Constitution Committee.

Property

Section 64. All officers, at the expiration of their term of office, or when removed, or when their of-

Respondents' Exhibit No. 7—(Continued)

fices are declared vacant, shall deliver to their successors all books, papers, moneys and other property in their possession belong to the United Brotherhood, and they shall not be relieved from their bonds or obligations until this Law is complied with.

Section 65. All Laws or part of Laws previously enacted by the United Brotherhood, and standing decisions of the General Executive Board in conflict with the Constitution as amended by the Twenty-Sixth General Convention of the United Brotherhood, are hereby repealed, and the General Executive Board is hereby authorized and empowered to make any needed changes as required by the vote of the Delegates to the Twenty-Sixth General Convention and the referendum vote effective January 1, 1951.

Standing Decisions of the General Executive Board
1887

February 15.—A Union not holding meetings at least once a month forfeits its charter and is not eligible to donations.

September 17.—Grading wages is demoralizing to Union principles and to the welfare of the trade and no Local Union should adopt the system of grading wages.

1888

March 10.—A Local Union can fix a fine as penalty for non-attendance of members at a monthly meeting.

1891

July 16.—All donations are forfeited by a sus-

Respondents' Exhibit No. 7—(Continued)
pendent Union the same as a suspended member. A suspended Union cannot be entitled to any donations other than those prescribed for a new Union.

1897

April 7.—Working Cards can only be issued through the Local Unions or District Councils of the United Brotherhood and without discriminating charge in any locality against outside members.

April 9.—Every part of the Ritual is just as binding on members as is the Constitution and Laws of the United Brotherhood.

1898

April 5.—Members violating Trade Rules and called out on strike are not entitled to strike donation.

Parliamentary Rules

Rule 1. On motion, the regular order of business (see inside front cover) may be suspended by a two-thirds vote of the meeting at any time, to dispose of any urgent business.

Rule 2. All resolutions and resignations must be submitted in writing.

Rule 3. Any conversation by whispering or otherwise, which is calculated to disturb a member while speaking, or hinder the transaction of business, shall be deemed a violation of order.

Rule 4. Partisan politics or sectarian discussion shall not be permitted in the meetings under any circumstances.

Rule 5. All questions of a parliamentary nature

Respondents' Exhibit No. 7—(Continued)
not provided for in these Rules shall be decided by
Roberts' Manual.

Motions

Rule 6. A motion to be entertained by the presiding officer must be seconded, and the mover as well as the seconder must rise and be recognized by the Chair.

Rule 7. Any member having made a motion can withdraw it by consent of the seconder, but a motion once debated cannot be withdrawn except by a two-thirds vote.

Rule 8. A motion to amend an amendment shall be in order, but no motion to amend an amendment to an amendment shall be permitted.

Rule 9. Any member may call for a division of a question when the sense will admit thereof.

Debate

Rule 10. A motion shall not be subject to debate until it has been stated by the Chair.

Rule 11. When a member wishes the floor he shall rise and respectfully address the Chair, and if recognized by the Chair, he shall be entitled to the floor.

Rule 12. If two or more members shall rise to speak at the same time, the Chair shall decide which is entitled to the floor.

Rule 13. Each member, when speaking, shall confine himself to the question under debate and avoid all personal, indecorous or sarcastic language.

Rule 14. No member shall interrupt another while speaking, except to a point of order, and he shall

Respondents' Exhibit No. 7—(Continued)
definitely state the point, and the Chair shall decide the same without debate.

Rule 15. If a member while speaking be called to order, he shall take his seat until the point of order is decided, when, if decided in order, he may proceed.

Rule 16. If any member shall feel himself personally aggrieved by a decision of the Chair, he may appeal to the Local Union from the decision.

Rule 17. When an appeal is made from the decision of the Chair, the VicePresident shall then act as Chairman, and he shall state the appeal to the meeting in these words: "Shall the decision of the Chair be sustained as the decision of the Union?" The member will then have the right to state the grounds of his appeal, and the Chair will give the reason for his decision, thereupon the Union will proceed to vote on the appeal, without further debate, and it shall require a majority vote to sustain such appeal.

Rule 18. No member shall speak more than once on the same subject until all the members desiring the floor shall have spoken, nor more than twice, without unanimous consent, nor more than five minutes at any one time.

Rule 19. The presiding officer shall not speak on any subject unless he retires from the Chair, except on points of order and appeals from the decision of the Chair, and in case of a tie he shall have the deciding vote.

Respondents' Exhibit No. 7—(Continued)

Privileged Questions

Rule 20. When a question is before the meeting, no motion shall be in order except: (1) to adjourn; (2) to lay on the table; (3) for the previous question; (4) to postpone to a given time; (5) to refer or re-commit; (6) to amend. And these motions shall have precedence in the order herein arranged. The first three of these motions are not debatable.

Rule 21. When the previous question is moved and seconded, it shall be put in this form: "Shall the main question be now put?" If this is carried, all further motions, amendments and debate shall be excluded and the main question put without delay.

Rule 22. If a question has been amended, the question on the amendment shall be put first. If more than one amendment has been offered, the question shall then be put as follows: (1) amendment to the amendment; (2) amendment; (3) original proposition.

Rule 23. When a question is postponed indefinitely it shall not come up except by a two-thirds vote.

Rule 24. A motion to adjourn shall always be in order, except; (1) when a member has the floor; (2) when members are voting; (3) when it has been decided to take the previous question.

Taking the Vote

Rule 25. Before putting a question to vote, the presiding officer shall ask: "Is the Union ready for the question?" Then it shall be open for debate. If no member arises to speak, the presiding officer

Respondents' Exhibit No. 7—(Continued)
shall then put the question in this form: "All in favor of the motion say Aye," and after the affirmative vote is expressed, "Those of the contrary opinion say No." After the vote is taken the Chair shall immediately announce the result.

Rule 26. When the presiding officer has commenced taking a vote, no further debate or remarks shall be allowed unless a mistake has been made, in which case the mistake shall be rectified and the presiding officer shall again take the vote.

Rule 27. Before the presiding officer declares the vote on a question, any member may ask for a division of the house; then the Chair is in duty bound to comply with the request, and a standing vote shall then be taken, and the Conductor shall count the same.

Rule 28. Every member present shall vote on all questions before the Union, unless personally interested or excused by the Union.

Rule 29. When a blank is to be filled, the question shall be taken first upon the largest sum or number, or the longest or latest time.

Rule 30. When a question has been decided it can be reconsidered only at the same meeting or on the next regular meeting night.

Rule 31. A motion to reconsider must be made and seconded by two members who voted with the prevailing side.

Rule 32. All questions, unless otherwise provided, shall be decided by a majority of all votes cast.

RESPONDENTS' EXHIBIT No. 8
(Received in Evidence March 24, 1952)

CONSTITUTION AND BY-LAWS
of Washington-Oregon
Shingle Weavers' District Council

Approved as Amended January, 1951

Article I.—Name and Headquarters

The name of this organization shall be the Washington-Oregon Shingle Weavers' District Council. All Unions affiliated with this organization shall be chartered by the United Brotherhood of Carpenters and Joiners of America.

Article II.—Purpose and Jurisdiction

The purpose of this organization shall be to secure and maintain shorter working hours, higher wages, better working conditions and greater harmony in the shingle industry. It shall promote the enactment and enforcement of legislation beneficial to its members and co-ordinate the activities of its affiliated Local Unions.

The jurisdiction of this organization shall extend over all men working in or around any plant engaged in the manufacture or processing of wood shingles, except those men held ineligible by the rules of this union.

Article III.—Officers

Section 1. The officers of the Washington-Oregon Shingle Weavers' District Council shall consist of a President and Secretary-Treasurer elected at large, and one District Vice-President elected

Respondents' Exhibit No. 8—(Continued)

by and from each affiliated Local Union. The above officers shall constitute the Council Executive Board. At the October Executive Board meeting, the Vice-President shall choose from their number three members who shall serve as the Board of Trustees for the ensuing year.

Section 2. Council officers shall be members in good standing in the Shingle Weavers' Union and must have been employed in the trade jurisdiction of this Council unless employed by their Local Union or by the Council. The President and the Secretary-Treasurer shall be citizens of the United States. No member of the Washington-Oregon Shingle Weavers' District Council will be eligible to hold a Council or Local Union office or offices unless he has been employed in the shingle industry at least one year and meets the other requirements as set forth in Section 31, Paragraph "D" of the General Constitution. He must be employed in the shingle industry at the time of nomination or be employed by his Union.

Section 3. Council Officers shall be elected for a term of two years, or until their successors are elected and installed.

Section 4. Nominations for the offices of the President and Secretary-Treasurer shall be made at the last regular meeting of the Local Unions in July and the names of the nominees sent to the Council Secretary. He in turn shall send a complete list of all nominees to the Local Unions. Any nominated person desiring to decline (or accept) the

Respondents' Exhibit No. 8—(Continued)

nomination shall notify the Council Secretary in writing not later than August 10. The Council Secretary shall mail the corrected list of nominees to all Local Unions not later than August 15, with printed ballots for same, in alphabetical form to all Local Unions.

In elections where only one candidate has been nominated for a District Council office, said candidate's name shall appear on the General Election Ballot and not on the Primary Ballot.

There shall be a preliminary ballot by each Local Union and the votes cast for all persons previously nominated shall be compiled by the Local Unions, and the number of votes cast for each nominee shall be mailed to the Council Secretary not later than September 5. Election returns in the Primary Election for Council Officers, postmarked after September 5, shall not be considered in the final results of the election.

The Council Secretary shall compile the number of votes cast for each nominated person, and the location of each Local Union casting such vote, and shall mail a copy of this to each affiliated Local. When a candidate seeking office in the District Council receives a majority of all votes cast in the Primary Ballot, he then and there shall be declared elected for the ensuing term of office, and that the usual subsequent General Election be eliminated. In case no candidate receives a majority of all votes cast we continue as in Paragraph 5, Section 4.

The names of the two candidates receiving the

Respondents' Exhibit No. 8—(Continued)

highest number of votes cast shall be voted on in a General Election. The Council Secretary shall cause to be printed ballots on which shall be the names of the nominees for the office or offices to be filled, with a space opposite each name for the voter to mark an X and with an attached stub on which the voter shall sign his name and the number of his Local Union. These ballots shall be mailed to the Local Union not later than September 15th. The General Election Ballot shall be held open, if necessary, until October 5th.

The Council Vice-President from each Local shall convey the tabulated vote and the ballots and stubs to the next regular Board meeting where they shall be recounted and compiled by a balloting committee. The elected officers shall be installed at the Board meeting.

Council Vice-Presidents shall be nominated and elected in their respective Local Unions, by the same method as election of Council Officers. Tabulation of ballots shall be by the Local Union.

Section 5. In case the office of Council President becomes vacant, the Council Secretary-Treasurer shall immediately call a meeting of the Council Executive Board to fill the vacancy for the unexpired term.

Section 6. Any person who has held an interest in a mill who has been nominated to office shall, before being elected to hold office, or vote in the Union, furnish proof that he has disposed of his

Respondents' Exhibit No. 8—(Continued)

interest and no longer participates in ownership or management of the plant.

Section 7. Each year the Council Secretary and President shall be allowed two weeks' vacation with pay. This vacation shall be taken at a time judged by the parties involved, to be the most suitable time to leave their business. The President and Secretary shall not take their vacations during the same period, and during the vacation period of one officer the other shall attend to any urgent business that may arise. In the event the urgency of the business requires additional help during the vacation of an officer, such help may be hired for the period of the emergency.

Article IV.—Duties of Officers

Section 1. The duties of the Council President shall be as follows:

1. Preside at Conventions and Executive Board meetings, and appoint all necessary committees unless otherwise ordered by the Convention or Executive Board.

2. Supervise over all activities of the Council and actively co-operate with affiliated Locals in organization work, negotiations, and in all such matters as affect the welfare of the District Council.

3. Keep the membership informed on the affairs of the Union and report to Conventions and Executive Board meetings on his activities for the preceding period. Have published in the *Shingle Weaver* each and every month a statement on the general condition of the Union.

Respondents' Exhibit No. 8—(Continued)

4. Interpret the Laws of the Council and working agreements, subject to revision or reversal by the Convention or Executive Board.

5. Call special meetings of the Executive Board whenever necessary.

6. Furnish vouchers of his expenses to the Council Secretary.

7. Perform such other duties as are assigned him by the Convention or Executive Board.

8. To have a picture taken of all the delegates at each convention, and a permanent plate made and placed on file in the Council office.

Section 2. The Secretary-Treasurer shall take charge of all books, papers, and effects of the Council office. He shall issue all notices and conduct all correspondence pertaining to his office. He shall keep a true and correct record of the proceedings of Conventions and Executive Board meetings and send a copy of the minutes to the affiliated Locals.

The Secretary-Treasurer shall be the custodian of the funds of the Council and shall deposit all funds in responsible banks. He shall receive and collect all monies due the Council and pay all lawful bills.

The Secretary-Treasurer shall submit to the proper Committee for inspection, vouchers for all monies received and expended, and shall submit to regular Conventions and Executive Board meetings a complete statement of all receipts and disbursements during the proceedings. A copy of this shall be sent to each affiliated Local.

Respondents' Exhibit No. 8—(Continued)

The Secretary shall keep a copy of all important correspondence sent out or received by his office.

The Secretary shall assemble and keep on record such data and statistics as will be of value to the Union. He shall perform such other duties as may be assigned him by the Convention or the Executive Board.

The Secretary-Treasurer shall affix the Council seal to all papers.

The Secretary-Treasurer shall have a voice but no vote at Convention and Executive Board meetings. He shall be bonded for such amount as may be designated by the Board of Trustees.

Section 3. Council Vice-President shall represent the Council with their Local Unions and shall take part in all negotiations in connection with agreements and administration of Laws and Rulings made by the Council.

Section 4. The Council Secretary shall notify the Council Vice-President when the Local Union he represents becomes delinquent with per capita tax payments.

Article V.—Executive Board

Section 1. The first regular meeting of the Council Executive Board, following the Convention, shall be on a date designated by the President, which shall not be later than the first Friday after the first Saturday in the month of June. The second regular meeting shall be on the first Friday after the first Saturday in the month of October. Other regular meetings of the Council may be called by

Respondents' Exhibit No. 8—(Continued)
the President, or upon request of not less than five Council Vice-Presidents. A quorum shall consist of not less than three-fifths of the members of the Executive Board.

The Council Vice-Presidents shall act as delegates to all conventions of the Washington-Oregon Shingle Weavers' District Council.

Section 2. The Executive Board shall direct the workings and execute the instructions of the Union. The Board shall have power to recommend the levying of such assessments as may be advisable, and make such other recommendations to the membership as they deem necessary to the welfare of the Union. Recommendations from the Executive Board to the membership shall be in the form of resolutions and shall be acted upon by the Locals in the same manner as those originating in Conventions.

The Board may call special Conventions when they deem it necessary.

The Board by a two-thirds vote, after trial, may suspend either the President or the Secretary-Treasurer, subject to ratification by the membership of the Union. Action of the latter shall be by secret ballot.

In no case shall action by the Executive Board to suspend either the President or Secretary be considered as sanctioned by the membership unless fifty-five per cent (55%) of the members of the District Council vote in favor of the suspension.

Each Council Vice-President shall submit to the

Respondents' Exhibit No. 8—(Continued)

Convention a written report of the Local Union conditions in his district.

Local officers holding Council offices, in addition to their Local office, when carrying on correspondence with places of business or addressing public meetings, shall use the title of their Local office and not the title of Council officer unless authorized by the Council to do so.

Section 3. Any time a Local sees fit to call upon the Washington-Oregon Shingle Weavers' District Council to finance the handling of labor disputes within the jurisdiction of said local, it shall be understood that the Council will have complete authority in effectuating and making proper settlement of said dispute.

Board of Trustees

At each regular Convention, and on a date not later than the first Friday after the first Saturday in the month of June and at the regular meeting of the Executive Board in the month of October, the Board of Trustees shall audit the books and financial records of the Secretary-Treasurer and report their findings to the Convention or Executive Board.

The Trustees shall have the supervision of all funds and properties of the District Council and shall see that the Secretary-Treasurer is bonded in an amount sufficient to cover any monies he may have in his possession.

Article VI.—Conventions

Section 1. The regular Conventions of the Wash-

Respondents' Exhibit No. 8—(Continued)
ington-Oregon Shingle Weavers' District Council shall be called at 10 a.m. on the first Thursday after the first Monday in January of each year and shall continue and adjourn at such time and date as may be determined by a majority of the delegates present. If necessary to expedite the business of the convention, the President may direct certain committees, chosen from the delegates, to meet immediately previous to the Convention. The place of the Convention shall have been selected at the previous Executive Board meeting.

The direct expenses of the Convention shall be assumed by the Council. The expenses of delegates and Council Vice-Presidents shall be paid by their Local Unions.

Section 2. Each affiliated Local shall be entitled to two delegates for the first five hundred members or less; one additional delegate for the next five hundred members or fraction thereof, and one additional delegate for any number of members over one thousand. These shall be in addition to the Council Vice-Presidents. The Membership of each Local shall be computed upon the average per capita tax paid into the Council by that Local for the preceding twelve months, except in the case of newly formed Locals, when it shall be based upon the average per capita tax paid for the period of its affiliation.

Delegates shall be present to vote and there shall be no vote cast for absent delegates.

Newly organized Locals must be organized at

Respondents' Exhibit No. 8—(Continued)

least one month and one month's per capita tax paid prior to the month in which the Convention is held to be entitled to representation.

Section 3. The Council Secretary shall issue the call for the Convention and send proper credential blanks in duplicate to all affiliated Locals not later than November 15th. The Locals shall elect their delegates and return one set of credential forms properly filled out, to the Secretary not later than December 10th. Each Council Vice-President shall present the duplicate set of credentials from his Local at the Convention.

Section 4. All resolutions and motions passed by the Convention shall be referred to the Local Unions within fifteen days after the adjournment of the Convention. Within thirty days thereafter, each Local shall vote on them and notify the Council Secretary the result of their vote, and if approved by a majority of the affiliated Locals, they shall become immediately effective.

It shall be the duty of the Council Secretary to notify all Locals of the action of the Membership on any motion or resolution voted on by it.

Section 5. All motions and resolutions proposing changes in the existing Working Agreements shall be in the nature of recommendations to the Council Negotiating Committee and shall be referred to that body.

Section 6. Any resolution originating in the Convention must be signed by not less than three accredited delegates.

Respondents' Exhibit No. 8—(Continued)

Section 7. Roberts Rules of Order shall prevail at all times in Conventions and Executive Board meetings unless otherwise specified by the Constitution and By-Laws of the Council or the Brotherhood.

Article VII.—Negotiating Committee

Section 1. There shall be a Council Negotiating Committee which shall represent the Council in conference with representatives of the employers in the shingle industry. The combined representatives of the two groups shall be known as the Joint Board.

The Council Negotiating Committee shall consist of the Council President and Secretary-Treasurer and one representative chosen from each of the districts established for that purpose.

Section 2. At each regular Convention, the delegates and the Council Vice-Presidents from the Locals in each district shall elect their representative on the Negotiating Committee.

The Boundaries of the districts as established by the 1937 Convention may be changed at any regular Convention.

Section 3. Salary expenses and transportation of members of the negotiating committee for attending Joint Board meetings shall be paid by the Council on the same basis as that used in paying the President and Secretary-Treasurer.

Section 4. It shall be the purpose of the Negotiating Committee acting under recommendations from the membership, to negotiate industry-wide

Respondents' Exhibit No. 8—(Continued)

working agreements. The Negotiating Committee shall also meet with representatives of the employer when such conference may aid in the solution of problems affecting the welfare of the shingle industry.

Section 5. The date of the regular annual meeting of the Joint Board for the purpose of revising the Working Agreement shall be set by agreement of the Joint Board. Rules for calling special meetings of the Joint Board shall be included in the Working Agreement.

Section 6. When a tentative agreement has been reached by the Joint Board, it shall be placed before the Council Executive Board, which shall either refer it back to the Joint Board for revision, or submit it to the membership for ratification. In the latter case, copies of the tentative agreement shall be sent to each Local together with printed ballots, by the Council Secretary as soon as possible.

Such agreements must be accepted or rejected in their entirety by the membership. Each Local shall, within fifteen days after receipt of the agreement, send in its tabulated vote, together with ballots and stubs, to the Council office to be recounted by a committee appointed by the Council President. The Secretary shall immediately thereafter notify the Locals the number of votes for and against the agreement by each Local.

If the agreement is rejected by the membership, it shall automatically go back to the negotiating committee for further negotiations.

Respondents' Exhibit No. 8—(Continued)

If an agreement that is acceptable to the membership cannot be reached, or if the manufacturer refuses to meet with the Negotiating Committee, the Council Executive Board shall make such recommendations to the membership as they see fit.

Section 7. When a member of the Negotiating Committee leaves the industry or resigns from the Committee, he shall notify the Council office. The President shall have the power to appoint an alternate member to the Committee when no alternate has been elected or the alternate refuses to serve.

Article VIII.—Resolutions

Section 1. Between Conventions, any affiliated Local may have a resolution passed by it, placed before the membership of the Council by sending a copy of such resolution to the Council Secretary, who in turn shall send copies of it to the affiliated Locals. The Locals shall notify the Council Secretary of their action on such resolutions within forty-five days. The resolution shall become immediately effective if approved by a majority of the affiliated Locals except that any such resolution which, in the opinion of the Council President is an amendment to the Constitution and By-Laws, shall require a two-thirds majority vote of the members present in each of the affiliated Locals. The Locals shall notify the Council Secretary of their action on such resolution within 45 days.

Article IX.—Revenue

Section 1. The funds of this organization shall be derived from a per capita tax to be paid monthly

Respondents' Exhibit No. 8—(Continued)

by the affiliated Local Unions and shall be due and payable on the first day of each month. Changes in the amount of per capita tax may be made by the Convention or Executive Board, but shall be referred to the Local Unions for approval.

Section 2. Any Local Union owing two months' per capita tax shall be notified by mail by the Council Secretary; and when owing three months' per capita tax shall be automatically suspended until all arrearages are paid, and shall not be entitled to a delegate in any meeting of the Council except by two-thirds majority vote of the delegates present at such meeting.

Section 3. The liability of the Union for the payment of strike benefits shall be limited to the special funds collected for this purpose.

Section 4. All assessments due must be paid before Dues, regardless of what month Dues are being paid for.

Section 5. Local Unions shall pay per capita tax on all members working on permits.

Article X.—Salaries of Officers

Section 1. For the faithful performance of their duties, the Council President and Secretary-Treasurer shall receive \$250 per month plus \$10 per day expenses when traveling away from home, plus transportation; seven and one-half (7½c) cents per mile when automobile is used; otherwise first-class transportation. In addition they shall receive all industry-wide increases as of November 1, 1945,

Respondents' Exhibit No. 8—(Continued)
based on the six-hour day and 26 days per month.

Section 2. Compensation of the President and the Secretary-Treasurer for the performance of the duties in connection with their office shall come exclusively from the Shingle Weavers' Unions.

Section 3. Salaries, expenses and transportation of Council Vice-Presidents when attending Council Executive Board meetings, shall be paid by the Council on the same basis as that used in paying the President and Secretary-Treasurer. Salary and expenses of organizers who may be employed by the District Council, after being authorized to do so by the membership, shall be on the same basis as that used in paying the President and Secretary-Treasurer.

Section 4. In any case where a man loses his overtime pay on his regular job, due to work connected with the District Council, this work for the District Council shall be paid at rate and one-half of the regular pay of the Council Officers.

Article XI.—Secret Ballot

Section 1. Members shall be permitted to vote on the job by secret ballot if the mill is in operation, on the following questions: Election of Council Officers; industry-wide changes in wage rates . . . hours of labor . . . working conditions . . . working agreements . . . strikes . . . and settlement of strikes. Local Unions shall tabulate their own ballots before sending same to the Council Secretary, where they will be rechecked by a committee appointed by the President.

Respondents' Exhibit No. 8—(Continued)

Members working in a district temporarily shall sign the ballot stub, which shall in turn be mailed to his home Local Union by the Local Secretary.

All questions voted on in the above manner shall be decided by the majority vote cast.

Article XII.—Union Label

Rules governing the issuance and use of the Union Label shall be drawn up by the Council Executive Board.

All applications for the Union Label shall be made through the offices of the District Council. The Local Unions shall bear the expense of supplying the Union Labels, stamps, dies, stencils, etc., used in their districts.

Section 1. Any Local Union of the District Council failing to supply the necessary stamps and supplies which are required in each mill for the application of the Union Label shall within a reasonable length of time be called upon to stand trial before the Executive Board of the District Council and if found guilty shall be subject to such penalty as recommended by the Executive Board.

Section 2. Any member working in a plant where the Union Label is not being applied will be working unfair and subject to such fine as prescribed by the Laws of the Washington-Oregon Shingle Weavers' District Council.

Article XIII.—Affiliations

The Shingle Weavers' Unions shall not have affiliations with any organizations, except the Parent

Respondents' Exhibit No. 8—(Continued)
body, Washington-Oregon Shingle Weavers' District Council, State Federation of Labor, and Central Labor Unions, without the following clause forming an integral part of the terms of those affiliations:

“It is agreed by all parties concerned that the Shingle Weavers shall at all times retain within their own District Council and affiliated Locals, complete trade autonomy and control of their own affairs. This shall include the right to establish their own working rules, to negotiate, establish, and terminate working agreements with the operators, and to work under the same.”

Article XIV.—Trials

Every member of the Washington-Oregon Shingle Weavers' District Council shall have the right to a fair and impartial trial in accord with Constitution and Laws of the Brotherhood.

Article XV.—Local Unions

Section 1. Application for charters for newly formed Local Unions shall be submitted to the Executive Board or the Convention and, if approved, appropriate recommendations shall be made to the Brotherhood.

When a Local Union ceases to function for the good of the Union, or wishes to consolidate with another Local Union, it shall be the duty of the District Council to take such action as is necessary to protect and safeguard the interest of the membership of the entire Union. Should the question

Respondents' Exhibit No. 8—(Continued)

of consolidation be involved, the Council shall hold or cause to be held an open hearing in the district of the Local Union to be dissolved, and shall give every consideration to the welfare of the members in said district, as well as the Union as a whole. The decision of the Council shall be final, subject to approval of the membership.

Section 2. Working Rules and By-Laws of Local Unions shall not conflict with, or be inconsistent with the Constitution and Laws of the Washington-Oregon Shingle Weavers' District Council or the United Brotherhood of Carpenters and Joiners.

Section 3. Working Rules and By-Laws of affiliated Local Unions shall be as nearly uniform as possible.

Section 4. A dispute between Locals that cannot be amicably settled by the Locals involved, or by the President, shall be referred to the Council Executive Board for settlement. Either party to the dispute may appeal the decision of the Board to the Convention.

Section 5. It is the duty of all Financial Secretaries to return stubs immediately upon acceptance of transfer to the Local that issued same.

Application for membership shall be made by permit men within thirty days from date of permit.

Section 6. A member owing a local a sum equal to six months' dues shall have his name stricken from the list of membership without a vote of the Local Union. If desiring to rejoin the Brotherhood,

Respondents' Exhibit No. 8—(Continued)

he may be re-admitted only as a new member. The Local Union re-admitting the ex-member shall collect from him an additional sum equal to six months' dues plus any fines and assessments owed at the time he was dropped from membership in the Brotherhood and the same shall be forwarded to the Local Union of which he was formerly a member.

Members one month in arrears shall pay a fine of one dollar.

Members two months in arrears shall pay a fine of four dollars.

Members three months in arrears shall pay a fine of nine dollars.

The foregoing fines shall not apply in cases where members have been employed in the industry for less than thirteen (13) days during any month for which fines would otherwise be due, because of illness or due to inability to secure employment, nor shall the foregoing fines apply in extreme cases where the imposition of same would result in extreme injustice. Members claiming exemption from such fine shall furnish satisfactory proof of eligibility and said claims shall be acted upon by the Local Union at the next regular meeting.

Names of members who have been dropped from membership rolls for non-payment of dues, or upon whom fines have been placed shall, upon authorization by the Local Union, be published in the *Shingle Weaver*.

Respondents' Exhibit No. 8—(Continued)

Section 7. Any member quitting employment in the shingle industry or accepting employment which makes him ineligible for membership, but which is not in violation of the Trade Rules of this Union, may resign from the Union upon the following conditions: The resignation must be presented in writing, giving reasons for the request, to be voted upon by the Local.

No member shall be granted a Withdrawal Card on the grounds that his status as a member has been changed, or will be, through his participation in the purchase or lease of a shingle mill, or a business agreement with a shingle mill, until the terms of such transaction have been approved by the Local. Such terms must be of such nature that the member can and will give a guarantee that he will continue to be governed by the Trade Rules and Working Agreement of the Union.

The applicant shall pay all fines, dues, and assessments up to date and the additional sum of fifty cents.

Under these conditions and with a favorable vote of the Local he shall be issued a Withdrawal Card.

Only regular Brotherhood Withdrawal Cards shall be used; a member holding a Withdrawal Card can be readmitted only as a new member in accordance with the Brotherhood Laws. Section 47, A and B.

Section 8. An acceptance fee of \$100.00 shall

Respondents' Exhibit No. 8—(Continued)

be placed on all non-union Shingle Weavers coming from all foreign countries, until the workers in those countries have secured hours, wages, and working conditions equal to those prevailing within the jurisdiction of the Washington-Oregon Shingle Weavers' District Council.

Section 9. Any member working unfair shall be subject to a minimum fine of \$100.00.

Section 10. Local Secretaries shall report to the Council Office within forty-five days the action taken by their Local on all matters pertaining to Council affairs, and it shall be the duty of the Council Vice-President to see that this article is carried out except as provided in Article VIII, Section 1.

Section 11. A member who desires to work in another jurisdiction from which he would return home daily, or who does not desire to transfer his membership, shall, before going to work, secure a Working Permit in writing from the Local Union or District Council in whose jurisdiction he may go to work.

Section 12. All dues and money sent from one Local to another shall be sent to the Financial Secretary. The Financial Secretaries' names and addresses shall be printed in the Shingle Weaver paper regularly.

Section 13. Financial Secretaries who do not fully understand all of the duties of their office,

Respondents' Exhibit No. 8—(Continued)

shall notify the Council President of this fact. The Council President shall use the powers granted him under the Constitution and By-Laws in making arrangements to provide proper instructions for Financial Secretaries in cases of this kind. When one or more Financial Secretary is called into conference for instructions in regard to the duties of Financial Secretaries, the wages and expenses of all Financial Secretaries so called shall be paid by the District Council on the same basis as that used in paying the Council President and Council Secretary-Treasurer.

Section 14. Any member in good standing in his Local Union may be issued a permit by a vote of his Local (good only in the jurisdiction of his Local Union) to learn any of the skilled branches whenever the opportunity presents itself.

Section 15. The initiation fee shall be \$10.00 plus one current month's dues in all locals except members entering on withdrawal cards, whose initiation fee shall be \$5.00 plus one current month's dues, except in those cases where the applicant for membership has committed an offense against the Shingle Weavers' Union.

Each case shall be considered in the light of the evidence presented and any special initiation fee shall not exceed Fifty Dollars (\$50.00).

Section 16. Where no extra men are available, men shall be allowed to trade shifts, providing that eight hours have elapsed between said shifts.

Respondents' Exhibit No. 8—(Continued)

Section 17. It is the duty of all Financial Secretaries to see that all per capita tax and assessments due to the Washington-Oregon Shingle Weavers' District Council, Carpenters and Joiners and all other per capita and assessments shall be paid after the first of each month and every month. Per capita tax shall be paid each and every month on the members in good standing.

Section 18. The Council Secretary shall notify all Financial Secretaries of all assessments levied for the Council to the amount and month. It is the duty of all Financial Secretaries to fill out a complete report to the Council office on forms issued by the Secretary of the Washington-Oregon Shingle Weavers' District Council.

Section 19. Internal disputes in Local Unions not covered by the Constitution and By-Laws of the District Council, must be brought before the Local Union where the dispute originates before being brought to the District Council.

Section 20. Any dispute between members of a crew will not be taken up by members of the District Council for settlement until so ordered by the Local Union who has jurisdiction over the men in that plant.

Article XVI.—Working Rules

No material shall be published in the "Shingle Weaver" which wilfully impugns the character of, or slanders any member of the Union.

Respondents' Exhibit No. 8—(Continued)

Section 1. There may be established a Local employment clearance agency by each of the affiliated Local Unions to furnish reliable Union help when available.

Section 2. Any Local Union that exhausts its supply of Union men cannot break in or take into their Local Unions non-union men until the supply of Union men from affiliated Local Unions has been exhausted; provided, however, a working clearance card may be issued to non-union persons from day to day until the supply of available men has been exhausted.

Section 3. Any member accepting employment without clearing, under rules established by the Local Union having jurisdiction, through the clearing agency of said Local Union, shall be subject to removal by the mill Steward or other Local officer, and subject to fine after trial by said Local Union. Any person found guilty of the above offense is subject to a fine of not more than \$10.00 for the first offense.

Section 4. No member can work for hire on another full-time job in addition to his regular job.

Section 5. A member's twenty-four hour period begins when his shift starts.

Section 6. Men may be allowed to work overtime until another man is available, providing they are paid time and one-half. This practice to be followed only in case of an emergency.

Respondents' Exhibit No. 8—(Continued)

Section 7. The scale for Jumbo Grades of shingles to be not less than ten cents per square additional for both sawing and packing. Packed 12 courses to the bunch, six bunches to the square. Any shingle thicker than Standard Grade shall be classified as Jumbo shingle.

Section 8. Any member of the Shingle Weavers' Union who allows a non-skilled member or non-member who has not been issued the proper permit to break into the skilled or semi-skilled brackets in which he is employed, shall after trial and conviction be fined not less than ten dollars for the first offense and not less than twenty-five dollars for the second offense.

Section 9. That all Locals instruct their members to refuse to take a medical examination as a condition of employment.

Section 10. The scale for sawing the so-called special pack which requires not more than three shingles to the course, shall be not less than two cents additional for No. 1's, No. 2's and No. 3's. Not less than ten cents per square additional shall be paid for splints. The scale for packing shall be not less than two cents per square additional for all grades. Not less than ten cents additional for splints.

Section 11. Not less than four cents additional per square shall be paid for splitting band sticks.

Section 12. Where there is no fixed bin, the scale is not less than five cents additional for saw-

Respondents' Exhibit No. 8—(Continued)

ing and not less than five cents additional for packing.

Section 13. Proper wage adjustment above the regular scale shall be made for any deviation from the regular pack.

Section 14. The wage for sawing and packing fir shingles has been established at five cents per square above the regular rate in each classification, with proportionate increases in all other brackets.

Section 15. All over three (3) packing bins in a mill shall be considered a "Local problem" and dealt with accordingly.

Section 16. It is understood that regular extra men shall have job rights the same as regular assigned men.

Section 17. Men who leave the industry will lose all job rights, as they cannot hold two jobs. This does not apply to men entering the armed forces during a period when the U.S.A. is at war or being drafted during peace time.

Section 18. All members shall insist upon payment of wages according to the following schedule:

All wages earned during the first half of any calendar month shall be paid in full, either in cash or by check which is immediately negotiable at full value, not later than the 25th day of the same month. All wages earned in the second half of any calendar

Respondents' Exhibit No. 8—(Continued)

month shall be paid, in the same manner as above, not later than the 10th day of the following month. Deductions for the usual state and federal taxes, medical contracts, group insurance, and Union dues may be made.

No members either individually or collectively, shall enter into any agreement, either verbal or written, with their employer or with each other, by which the said members do not receive full cash payment for all wages earned according to the above paragraph without said agreement being approved by their Local and by the Council officers.

In the absence of any such approved agreement, should any mill fail to pay the wages due according to the above schedule, it shall be the duty of the members employed in said plant, or their Union representative, to immediately report such occurrence to their Local, which shall immediately take all necessary steps to enforce the payment of said wages as prescribed above.

Any member violating the above rule or its intent shall be subject to such penalty as his Local may see fit to inflict.

In case any Local does not properly enforce this rule, it shall be the duty of the Council President to see that it is properly enforced. If necessary, he shall call in the Executive Board of the Council and the Local Executive Board. Final decision in the matter shall be by the Council Executive Board.

Respondents' Exhibit No. 8—(Continued)

Section 19. Any member who is an owner of an interest in a lease, or share of stock in any mill, and when working in the shingle industry in any other plant than the one he has an interest in, shall be permitted to vote on election of Local and Council Officers, but not eligible to hold office.

Section 20. All men working at jobs which ordinarily come under the jurisdiction of this Union, regardless of whether or not they are participants in the ownership of the plant or the business agreement under which it is operated, shall be classified as employees. If the purchase of the plant by the crew is involved, no part of any member's wages earned shall be deducted except for the purchase of stock in the plant in which he is employed. No deductions from his wages shall be applied to the operation and maintenance expense of the plant. The total deduction from the wages of those employees who are purchasing an interest in the operation shall not exceed ten cents per square, based on the total mill cut per day.

If less than 100 per cent of the employees are co-partners, the deductions shall not be more than their percentage would be if 100 per cent of the crew were co-partners.

The purchase price of said plant must be based on the fair market value of said mill, and the sale must be a bona fide sale of the plant and/or site.

Section 21. The following interpretation of

Respondents' Exhibit No. 8—(Continued)

“hours worked” shall be observed by all members: Time worked is that time during which an employee is on duty, and is either performing or is holding himself ready to perform work which is, by common understanding, a part of his job.

Section 22. The regular starting and stopping time shall be observed by all members, except that, with the consent of the Union and under circumstances which make it otherwise impossible to maintain efficient and continuance production, certain employes may be permitted to begin their shifts and take their lunch periods regularly at times other than the regular shift starting and stopping times; however, if such employees have a regular starting time which is less than two hours in advance of the regular mill starting time, they shall not be required to leave duty until the end of the regular shift.

Section 23. The regular hours of labor shall not exceed six hours, broken by a lunch period of not to exceed sixty (60) minutes, except as otherwise provided in the Agreement.

Section 24. All time worked before an employee's regular starting time, during his regular lunch period and after his regular stopping time shall be paid for at time and one-half except as otherwise provided in the Agreement.

Section 25. The Financial Secretaries, when issuing receipts for money accepted, shall clearly

Respondents' Exhibit No. 8—(Continued)
show on the receipt whether money is for initiation fee, dues and month paid for, fines, assessments, working permits, etc.

Section 26. All Locals shall see that all Agreements are signed, one for the Local Union, one for the operator, one for the General Office (District Council), and one signed copy shall be posted in the mill within thirty days after Agreements are received, and the Council Vice-President in each district shall see that this rule is enforced.

Where provisions of this Constitution and By-Laws are in conflict with the current Agreement, the provisions of the Agreement shall prevail.

It is understood that this Constitution and By-Laws as amended having been ratified by the membership shall become immediately effective and supersede all Legislation previously passed.

Approved as amended January, 1951.

RESPONDENTS' EXHIBIT No. 9
(Received in Evidence March 24, 1952)

Everett Shingle Weavers Union
Local 2580
Labor Temple, Everett, Washington

UNION LABEL CONDITIONS

It is hereby understood that in granting the use of the Label of the United Brotherhood of Carpenters and Joiners of America, that the Label shall at all times remain the property of the United Brotherhood of Carpenters and Joiners of America, and may be recalled at any time that it is being used to the disadvantage of the members of the organization.

It is understood that the Label is under the supervision of Shingle Weavers Local Union 2580, a chartered body of the United Brotherhood of Carpenters and Joiners of America.

Date: 2/10/51.

/s/ SOUND SHINGLE CO.,
Name of firm

/s/ By JACK BUTTERS

WILLIAM FRANCIS MILLER

R-X-10
MARYSVILLE, WASHINGTON
SOUND SHINGLE CO.



100% Edge-grain 100% All Clear 100% Heartwood

THESE SHINGLES ARE GUARANTEED TO MEET ALL THE QUALITY
 REQUIREMENTS OF COMMERCIAL STANDARD C. S. 31-38 FOR RED
 CEDAR SHINGLES AS ISSUED BY U. S. DEPARTMENT OF COMMERCE,
 WASHINGTON, D. C.

LITHO IN U. S. A.

RED CEDAR SHINGLE BUREAU

NO. **1**
BLUE LABEL
 GRADE

CERTIGRADE
Red Cedar
SHINGLES

18" — 5 2 1/2"

NATIONAL LABOR RELATIONS BOARD

Docket No. 19-CB-46 OFFICIAL EXHIBIT NO. R-10

Disposition

Identified
 Received
 Rejected X

In the matter of Wm. O. Shingle WorksDate 4-24-54 Witness

No. Pages /

The Handbook Free

One hundred pages of information on the application of Certificate Shingles is to be found in our *Handbook*. The only book of its kind. Dealers, Carpenters, Contractors and Architects may have a copy **ABSOLUTELY FREE** by sending this label with name and address to

RED CEDAR SHINGLE BUREAU

5510 White Building Seattle 1, Washington

CAUTION: The life of a roof depends upon proper application. Follow these rules:

NAILS—Only two rust-proof nails should be driven into any shingle regardless of its width. Nails should be located about one-half inch from each edge of shingle and about one inch above the butt line of the overlapping shingle.

EXPOSURE—On roofs of quarter-pitch and steeper, 16-inch shingles should be exposed 5" to the weather, 18-inch shingles, 5 1/2".

SPACING—Shingles should be spaced 1/4" apart. Joints (that is, spacing between shingles) in three successive courses should *not* be in alignment.

See diagram.



NATIONAL LABOR RELATIONS BOARD

Docket No. 19-CC-42 OFFICIAL EXHIBIT NO. R-10

Disposition

Identified

Received

Rejected X

In the matter of W.N. O.R. Shingle Workers

Date 4-24-52 Witness _____ _____ MILLER

No. Pages 1

RESPONDENTS' EXHIBIT No. 11
(Received in Evidence March 25, 1952)

United States of America

172

No. 475

State of Washington

Office of the Secretary of State

I, Sam H. Nichols, Secretary of State of the State of Washington, do hereby certify that an application for registration of the Trade Mark Union Label (on manufactured woodenware) from United Brotherhood of Carpenters and Joiners of America of Indianapolis, Ind., was, on the 6th day of August, A.D. 1903, filed for record in this office and recorded in Book 2, Trade Mark Register, at page 288.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the State of Washington. Done at Olympia, this 25th day of August, A.D. 1903.

/s/ SAM H. NICHOLS,
Secretary of State

RESPONDENTS' EXHIBIT No. 12
(Received in Evidence March 24, 1952)

SUBPENA DUCES TECUM

United States of America
National Labor Relations Board

To John E. Martin:

You are hereby required to appear before The Honorable Wallace Royster, Trial Examiner of the

Respondents' Exhibit No. 12—(Continued)

National Labor Relations Board, at 407 U. S. Court House in the City of Seattle on the 25 day of April, 1952, at 2 o'clock of that day, to testify in Case No. 19-CC-42.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

All of the documents, invoices, shipping records and labels pertaining to the processing and shipping operations with respect to the carload of shingles received from North Shore Shingle Co., Ltd., on or about Jan. 14-52; and any and all labels of North Shore used or to be used in connection with the transaction herein referred to.

Fail not at your peril.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Seattle, Wash., this 25th day of April, 1952.

/s/ JOHN M. HOUSTON

Notice to Witness: If claim is made for witness fee or mileage, this subpoena should accompany voucher.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. James V. Constantine, Washington, D. C., for the General Counsel.

Messrs. George E. Flood, of Seattle, Wash., Francis X. Ward, Indianapolis, Ind., for the Respondents.

Miss Mary Ellen Krug, of Seattle, Wash., for the Employer.

Before: Wallace E. Royster, Trial Examiner.

Statement of the Case

Upon charges duly filed by John E. Martin, one of the partners doing business as Sound Shingle Co., herein called the Employer, against Washington-Oregon Shingle Weavers' District Council, and Everett Local 2580 Shingle Weavers Union, herein called Respondents, the General Counsel of the National Labor Relations Board issued his complaint dated April 9, 1952, alleging that Respondents, and each of them, had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

In respect to unfair labor practices, the complaint alleges in substance that since on or about January 11, 1952, the Respondents, and each of them, have induced and encouraged employees of the Employer to engage in a strike or a concerted refusal in the

course of employment to use, manufacture, process, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services for the Employer, an object thereof being to force or require the Employer to cease using, handling, or otherwise dealing in the products of North Shore Shingle Company, Ltd., a Canadian corporation, and to cease doing business with that corporation.

In a joint answer, filed April 17, 1952, Respondents denied the commission of unfair labor practices.

Pursuant to notice, a hearing was held before the undersigned Trial Examiner in Seattle, Washington, on April 24 and 25, 1952. The General Counsel, the Employer, and the Respondents were represented by counsel, participated in the hearing, and were afforded full opportunity to examine and cross-examine witnesses, and to introduce evidence relevant to the issues. The General Counsel argued on the record, and briefs have been received from counsel for the Employer and counsel for the Respondents.

Upon the basis of the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Employer

The Employer at all times material to this proceeding has been engaged at Marysville, Washington, in the business of manufacturing and processing shingles and shakes. During the year 1951

the Employer manufactured, processed, and then shipped from its plant to states and territories of the United States, other than the State of Washington, products valued in excess of \$42,000.

II. The Respondents

Washington-Oregon Shingle Weavers' District Council, and its constituent, Everett Local 2580 Shingle Weavers Union, are both affiliated with the United Brotherhood of Carpenters and Joiners of America and with the American Federation of Labor. Both are labor organizations, as defined in Section 2 (5) of the Act.

III. The Canadian corporation

North Shore Shingle Company, Ltd., herein called North Shore, is a Canadian corporation located in Vancouver, British Columbia, Canada, where it is engaged in the manufacture and sale of shingles.

IV. The unfair labor practices

The Employer began operation of shingle and shake plants in Marysville, Washington, in January 1951. In the same month one of the partners, John E. Martin, was told by O. M. Sarrett, a representative of the Respondent District Council that Martin would not be permitted to use Canadian shingles in his operations and that an attempt to do so would result in the closing of the plant. This warning appears to have been an implementation of a policy of the District Council earlier announced in its official monthly publication, the "Shingle Weaver." The policy as there set forth is to eliminate all "unfair Canadian or other non-union"

shingles from United States markets. On February 2, 1951, the Employer entered into a collective bargaining contract with the Respondents in respect to the Marysville operation. Thereafter, until January 11, 1952, operations continued without incident of interest here. On the latter date, the Employer's shingle mill having been closed for some period, a carload of shingles from North Shore arrived at the Employer's siding. Jack Butters, the Employer's superintendent, and other employees, among them John A. Martin, Respondents' shop steward in the shake plant, opened the car and observed that the shingles bore no union label. Walter Nelson, an employee, testified that Steward Martin remarked "they are B. C. [British Columbia] shingles and we won't do nothing with them. We will let them sit there." Steward Martin testified that it was the understanding of all union members that they would not work on unfair products, that is products not bearing a union label. There being no material on which the crew could work other than the shingles from North Shore, the men left the plant. The shake plant has not operated since that date.

Learning of this development, John E. Martin arranged a conference with Arthur Brown, president of the District Council. Before the conference took place, however, another representative of the Council, O. M. Sarrett arrived at the plant. Martin asked Sarrett why he was not permitted to use Canadian shingles. Sarrett brought in one Baker, whom he introduced as a member of the District Council from Oregon, to answer the question. Baker explained,

according to Martin's credited and uncontradicted testimony, that Canadian shingles were unfair in that the workers in the shingle mills there did not enjoy the same wages, hours, and working conditions as employees in the United States, and until such time as these conditions were equalized the District Council would oppose the use of Canadian shingles anywhere in the United States. Martin asserted that the shingles which were on his siding were manufactured by North Shore under a collective bargaining agreement with a CIO union and that several mills in Canada had contracts with the same International with which the District Council and the Everett Local were affiliated. Sarratt answered, still according to the credited testimony of Martin, that it made no difference: that the Canadian employers did not have a contract with the District Council and did not pay the same wages or operate the same hours as in the States. Sarrett went on to say, "We have been working on them for quite some time to get their standard up to ours and until such time as we, we can get the mills to sign a contract with us and agree to the same wages, hours and working conditions we absolutely won't allow you to run them."

On Monday, January 14, Brown came to the plant and brought with him Glen Uttley, president of Local 2580, and Steward Martin. John E. Martin testified, credibly and without contradiction, that he told Brown he wished to get the shake plant running. Brown answered that the only way he could do so was to process his own shingles or to buy

those made in the United States; that he would never allow Martin to process Canadian shingles. Brown went on to say that if Martin intended using Canadian shingles he had better move his plant elsewhere as he would never be permitted to work on them in Marysville. Brown asserted that he had been trying to organize the Canadian mills in an attempt to establish the same wages, hours, and working conditions that existed in the States and mentioned that he was at the point of success in this campaign with one Canadian manufacturer who was eager to find a market for his product in California. When John E. Martin asked if Brown was calling the men off the job, Brown at first answered that he was not; that the men merely refused to work on Canadian shingles. At this point Martin turned to Shop Steward Martin and asked if that were so. Steward Martin, turning to Brown, said, "The reason that we refuse to work on Canadian shingles is because you ordered us not." Brown then said, "Well, O.K. For the record, let us have it that way. We absolutely won't allow your boys here to work on Canadian shingles." The Shingle Weaver, in January of 1952, under the by-line of Brown, carried an article reasserting the determination of the District to keep Canadian shingles out until such time as the same wages, hours, and working conditions existing in the Washington-Oregon area were established above the border.

Elwin Rosenbach testified that around February 1, 1952, he and Joe Bockwinkel, both of whom until January 11, had been employed in the shake plant,

spoke to Art Brown about going back to work for the Employer. According to Rosenbach, Brown said that he could not stop them from doing so, but as the Employer was using unfair shingles the men would find themselves on a black list.

The incidents, actions, and statements reviewed above find no substantial dispute in the record and are credited.¹ Counsel for the Respondents asserts, however, that the only dispute was with the Employer and that North Shore or any other Canadian employer or manufacturer were strangers to any controversy that existed. It is argued in behalf of Respondents: First, that the employees of the Employer left their work voluntarily and without suggestion from Respondents because union men traditionally refuse, as a matter of principle, to work on materials not produced by union labor. Even if it is established, goes the argument, that the Respondents induced or encouraged the men to leave their work, it was not accomplished by threats of reprisal or promise of benefits, and thus finds protection in Section 8 (c) of the Act. The argument is made that the Employer was attempting to pawn off shingles manufactured under nonunion conditions as union made. It is asserted that had the men remained at work, the shingles would have been

¹Of course what representatives of Respondents said to the Employer is of interest here as shedding light on motivation and control. To the extent that it was part of an effort to persuade the Employer to cease doing business with North Shore, no unfair labor practice is involved.

shipped from the Employer's plant bearing the union label. Finally, it is said, the collective bargaining agreement contemplates that Respondents' members will not be required to work on "unfair" products.

The facts as stated indicate a *prima facie* violation of the Act as alleged, and I do not find merit in the defenses interposed. It can hardly be doubted under the evidence that the employees left their work on January 11 in response to instruction, inducement, or encouragement by the Respondents. It was then and perhaps still is the policy of the Respondents to refuse to work on shingles of Canadian manufacture. That this policy was announced in phrases not readily to be characterized as threats of reprisal or promises of benefit, does not place them beyond consideration because of Section 8 (c). As the Court said in *International Brotherhood of Electrical Workers, Local 105 vs. N.L.R.B.*, 341 U.S. 694, "The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amounted to a 'threat of reprisal or force or promise of benefit.' Such an interpretation would give more significance to the means used than to the end sought." Nor do I find it possible to agree under the evidence that the Respondents had no dispute with North Shore or other Canadian manufacturers of shingles. They said that they had

and asserted that their members would not work on Canadian shingles until such time as they were successful in establishing comparable wages and other conditions of employment in the Canadian mills. I suppose it is possible that the Respondents were speaking in this connection with tongue in cheek; that no matter what working conditions might be secured for employees in Canadian mills, the Respondents would still oppose the processing of the Canadian product by mills in the Washington-Oregon area. But no such conclusion is supported by any evidence in this record. I find the case here to be decided distinguishable from the holding of the District Court in *Douds vs. Sheet Metal Workers' Union*, U. S. District Court, Eastern District of New York, 29 LRRM 2084. It is urged that the collective bargaining agreement between the Employer and the Respondents provides, in effect, that the employees are privileged collectively to refuse to work on "unfair" products. But Article VI, Paragraph (c), of that agreement, which is cited as pertinent in this connection, would seem to be a restriction upon Respondents to prevent them from characterizing a product as unfair if it had been produced under "fair" conditions. Thus, I find no agreement between the Respondents and the Employer permitting the former to instruct its members not to work on products not bearing Respondents' label. The decision in *Conway's Express vs. N.L.R.B.*, 29 LRRM 2617, would thus appear to have no particular relevance here.

At the hearing and in its brief, the Respondents

assert that in some fashion abuse of their label was threatened by the Employer. There is not the slightest evidence that this constituted in any way the cause or one of the causes for the strike. On February 10, 1951, the Employer agreed, in writing, that the label should at all times remain the property of Respondents and could be recalled at any time that it was being used to their disadvantage. So far as this record shows, no attempt to recall it has been made.

It is found that the strike in the plant of the Employer, beginning on January 11, 1952, and still in effect at the time of the hearing, had as an object forcing or requiring the Employer to cease using, handling, or otherwise dealing in the products of North Shore or other Canadian shingle manufacturers, and to cease doing business with such Canadian enterprises. That the Respondents may have had other and legitimate objects (not apparent in this record) provides no defense. I find that by inducing and encouraging the employees of Sound Shingle Co. to engage in the strike of January 11, 1952, Respondents violated Section 8(b) (4) (A) of the Act.

V. The effect of the unfair labor practices
upon commerce

The activities of Respondents, set forth in Section IV, above, occurring in connection with the operations of the Employer, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and Territories of the United States

and tend to lead to and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The remedy

Having found that the Respondents have violated Section 8 (b) (4) (A) of the Act, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Washington-Oregon Shingle Weavers' District Council, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor and Everett Local 2580 Shingle Weavers Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L., are labor organizations within the meaning of Section 2 (5) of the Act.

2. By inducing and encouraging employees of Sound Shingle Co. to refuse in the course of their employment to perform work for their Employer, an object thereof being to force and require Sound Shingle Co. to cease doing business with North Shore Shingle Company, Ltd., and other Canadian shingle manufacturers, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair

labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, I recommend that Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers Union, the agents, successors, and assigns of each, shall:

1. Cease and desist from engaging in or inducing or encouraging their members to engage in a strike or a concerted refusal in the course of their employment to perform services for Sound Shingle Co. or any other employer where an object thereof is to require such employer or employers to cease doing business with North Shore Shingle Co., Ltd., or other Canadian shingle manufacturers.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

- (a) Notify all members of Local 2580 that they are free to work for Sound Shingle Co. and that such employment will not prejudice their rights, privileges or standing in either Local 2580 or the District Council;

- (b) Notify Sound Shingle Co. that it will not induce or encourage employees of that partnership to engage in a strike or a concerted refusal in the course of their employment to work upon or otherwise handle products of North Shore Shingle Company, Ltd., or other Canadian shingle manufacturers for the purpose of requiring Sound Shingle Co. to cease doing business with any Canadian shingle manufacturer;

(c) Post in conspicuous places at the business office of Local 2580 in Everett, Washington, where notices to members are customarily posted, and distribute for posting to all locals affiliated with the District Council, a copy of the notice attached hereto as Appendix A. Copies of the notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed by a representative of the District Council and one of Local 2580, be immediately posted and maintained for a period of sixty (60) days thereafter. Reasonable steps shall be taken by the Respondents to insure that the notices are not altered, defaced, or covered by other material;

(d) Notify the Regional Director for the Nineteenth Region (Seattle, Washington), in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order what steps the Respondents have taken to comply herewith.

It is also recommended that unless the Respondents and each of them shall within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order notify the said Regional Director, in writing, that each will comply with the foregoing recommendations, the Board issue an order requiring either or both Respondents to take the aforesaid action.

Dated this 21st day of May, 1952.

/s/ WALLACE E. ROYSTER,
Trial Examiner

APPENDIX A

Notice to all Members of Everett Local 2580 Shingle Weavers Union and to all Members of Constituent Locals of Washington-Oregon Shingle Weavers' District Council Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

We Will Not engage in or induce or encourage the employees of Sound Shingle Co., Marysville, Washington, or of any other employer, to engage in a strike or a concerted refusal in the course of their employment to perform services for such an employer where an object thereof is to require Sound Shingle Co., or any other employer, to cease doing business with North Shore Shingle Company, Ltd., or any other Canadian shingle manufacturer.

We Will Not for the above proscribed object interfere with the right of any member to work for Sound Shingle Co., if offered employment, and will not for that object prejudice the rights, privileges, and standing of any member in our organization.

WASHINGTON-OREGON SHINGLE
WEAVERS' DISTRICT COUNCIL
EVERETT LOCAL 2580 SHINGLE
WEAVERS UNION

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

UNION RESPONDENTS' EXCEPTIONS TO
INTERMEDIATE REPORT OF TRIAL
EXAMINER

Counsel for respondents above named hereby excepts to the Intermediate Report of the Trial Examiner, dated the 21st day of May, 1952, in the above entitled proceeding in the following particulars:

Reference to Intermediate Report

Page 2, lines 45-49—1. To that portion of finding IV that John E. Martin, a member of Management, was told in January, 1951 by C. M. Sarret, a representative of the respondent District Council, that Martin would not be permitted to use Canadian shingles in his operations and that an attempt to do so would result in the closing of the plant, on the ground that the statement is incompetent, irrelevant and immaterial to the issue framed by the complaint and that statements of this character are protected activity under Sec. 8 (c) of the Act and are not competent, relevant or material to establish any violation of 8 (b) (4) (A) of the Act, as charged, and are mere hearsay.

Page 2, lines 49-54—2. To that portion of finding IV insofar as the Trial Examiner attempts to draw the conclusion that the statement of Martin, referred to in Exception 1, was an implementation of the policy of the District Council as announced in its official publication, "The Shingle Weaver", and particularly the conclusion of the Trial Examiner

that the policy of the respondents is to eliminate all “unfair Canadian or other non-union” from the United States markets, on ground that the finding, as framed, is incompetent, irrelevant and immaterial to establish any violation of Sec. 8 (b) (4) (A) of the Act, as charged, and on the further ground that the publications of union organizations for circulation to their own membership and to the public at large are protected concerted activity under Sec. 8 (c) of the Act and protected under the First Amendment to the Federal Constitution of the United States.

Page 2, lines 55-57—3. To that portion of finding IV which states that operations, until January 11, 1952, “continued without incident of interest here”, on the ground that the record establishes without contradiction that until January 11, 1952 the employer’s operation in the shake plant was confined to the processing of shakes from shingles that in all instances bore the union label. Respondents also except to the cited finding insofar as it fails to disclose that the Employer in the instant case did, shortly prior to the controversy herein, as a member of Management of another plant, known as Perma Products, Inc. plant, located at Chehalis, Washington, employ, use and attach to that plant’s products, respondents’ union label without any right or authority to do so and that respondents were compelled to take legal action against the Employer in that particular case in order to prevent the unlawful attachment of its label to non-union made shakes, and in order to prevent their being held out and

falsely represented as manufactured under conditions fair to respondent union.

Page 3, lines 10-35—4. To the findings set forth in the entire paragraph embraced within the lines 10-45 on the ground that the conversations therein referred to occurred after January 11, 1952, being the date when the individual employees refused to work on the shingles in question and, as such, are incompetent, irrelevant and immaterial to prove or establish any violation of 8 (b) (4) (A) of the Act and are protected under 8 (c) of the Act and the First Amendment to the Federal Constitution of the United States, and on the further ground that the conversations between representatives of labor union and management are not competent, relevant or material proof of a violation of 8 (b) (4) (A) of the Act.

Page 3, lines 36-58—5. To the finding embraced within lines 36-58 on the ground that the conversations therein referred to are not supported by the record except by the self-serving declaration of the complainant John E. Martin and is not corroborated by any other witness, and on the further ground that the conversations therein referred to occurred on January 14, 1952—three days after the work stoppage involved herein occurred and, therefore, incompetent, irrelevant and immaterial to establish any violation of 8 (b) (4) (A) of the Act as charged, and on the further ground that the conversations therein referred to constituted conversations between respondent unions and the employer in this case and therefore incompetent, irrelevant and im-

material to establish (even if credited) any violation of 8 (b) (4) (A) of the Act, and, further, that said conversations are protected concerted activity under 8 (c) of the Act and the First Amendment to the Federal Constitution of the United States.

Page 3, lines 58-62—6. To the finding embraced within lines 58-62 on the ground that there is no evidence that Arthur Brown wrote, ratified or approved any article written in “The Shingle Weaver” on January . . . , 1952 or that said article was published or distributed to any employees of the Sound Shingle Company prior to January 11, 1952, nor is there any evidence in the record to support the characterization of the Trial Examiner to the effect that The Shingle Weaver “carried an article reasserting the determination of the District to keep Canadian shingles out until such time as the same wages, hours, and working conditions existing in the Washington-Oregon area were established above the border.”

Respondents further except to said finding on the ground that it is incompetent, irrelevant, and immaterial to establish any violation of 8 (b) (4) (A) of the Act as charged in the complaint, and on the further ground that such article would be protected concerted activity both under 8 (c) of the Act and under the First Amendment to the Federal Constitution of the United States.

Page 4, lines 1-7—7. To the entire finding contained in said paragraph embraced within the cited lines on the ground that the testimony of Elwin Rosenbach as to what occurred on February 1, 1952,

is incompetent, irrelevant and immaterial in that the conversations referred to occurred after the work stoppage herein involved, and on the further ground that said conversations are incompetent, irrelevant, and immaterial to establish any violation of 8 (b)(4) (A) of the Act and are necessarily protected concerted activity under 8 (c) of the Act.

Page 4, lines 8-27—8. To the finding embraced within lines 8-27 on the ground that the statements and assertions therein made are purely matters of argument and not properly findings of fact, and on the further ground that the findings and allegation therein that they are not disputed in the record is erroneous and is, in fact, disputed by the respondents, as is more particularized in respondents' exceptions to the record and their brief on file herein.

Page 4, lines 29-30—9. To the finding that "facts as stated indicate a prima facie violation of the Act as alleged, "on the ground that the facts, even as stated by the Examiner, do not establish a prima facie violation or any violation of any nature whatsoever by respondents of 8 (b) (4) (A) of the Act as charged.

Page 4, lines 30-33—10. To the finding that "It can hardly be doubted under the evidence that the employees left their work on January 11 in response to instruction, inducement, or encouragement by the Respondents", on the ground that there is no evidence in the record to support the conclusion of the Examiner as stated in said lines, and on the further ground that the conclusion is unsupported by a preponderance of substantial evidence in the case; and

that the facts clearly establish that four employees of the Sound Shingle Co.—each individually and spontaneously—refused to unload a car of shingles belonging to and owned by Sound Shingle because said shingles did not bear the union label.

Page 4, lines 33-34—11. To the finding that “It was then and perhaps still is the policy of the Respondents to refuse to work on shingles of Canadian manufacture.” on the ground that there is no evidence to support the assumption that the respondents have ever had such a policy, and on the further ground that any policy of the respondents with respect to this issue made or declared to their membership as a whole is protected concerted activity within the meaning of 8 (c) of the Act, and on the further ground that such policy is a right protected by the First Amendment to the Federal Constitution of the United States, and on the further ground that the presence or the absence of such policy is incompetent, irrelevant and immaterial to any issue framed by the complaint and is irrelevant and immaterial in the proof of any charge under 8 (b) (4) (A) of the Act, and the further ground that neither North Shore nor any other Canadian manufacturer is a party to this controversy, nor is there any privity between any Canadian company and respondent union, nor any evidence that respondent union had knowledge of the existence of North Shore, and upon the ground that the shingles in fact, upon the day in question, were property of Sound Shingle and did not belong to North Shore.

Page 4, 34-45—12. To the finding and the conclu-

sion of the Examiner in the quoted lines to the effect that Section 8 (c) of the Act, as construed by International Brotherhood of Electrical Workers, Local 105 vs. NLRB, 341 U. S. 694, does not insulate and protect respondents in this case from any violation of 8(b) (4) (A) of the Act, and respondents maintain that the legislative history of the Act, as construed by the courts, clearly establishes that any and all statements of a labor organization made to its general membership on matters of general policy are protected activity under 8 (c) of the Act and that so long as there is no "threat of reprisal or force or promise of benefit" to the employees of another employer there cannot be the "type of inducement or encouragement" described in and which is the gravamen of a violation of 8 (b) (4) (A) of the Act.

Page 4, lines 45-48—13. To the finding, conclusion and argument of the Examiner to the effect that he does not "find it possible to agree under the evidence that the Respondents had no dispute with North Shore or other Canadian manufacturers of shingles." on the ground that there is no evidence in the record to show or establish that respondents have or ever had at any time any program, purpose or jurisdiction to organize the employees of North Shore or any other Canadian manufacturer of shingles and there is no evidence in the record to support the conclusion that respondents have at any time dealt with North Shore or any other Canadian manufacturer or the employees of North Shore or any other Canadian manufacturer, nor that the respondents

have ever had any connection of any nature whatsoever with North Shore or any other Canadian manufacturer of shingles, and on the further ground that the overwhelming weight of the evidence shows that respondents could not have a “dispute” with the employees of North Shore or any other Canadian manufacturer, within the meaning of the definition of that word, under the National Labor Relations Act, as amended.

Page 4, lines 48-51—14. To the finding that respondents said that they had a dispute with North Shore or other Canadian manufacturer of shingles, on the ground that there is no evidence in the record that the respondents, or any of them, or any member of respondent union, has ever stated that they had a labor dispute or any dispute whatsoever with North Shore or any other Canadian manufacturer of shingles, and on the further ground that there is no evidence in the record to support a conclusion that respondents have at any time asserted that their members would not work on Canadian shingles until such time as they were successful in establishing comparable conditions or other conditions of employment in the Canadian mills, and no evidence that respondents concerted to do anything other than to refuse to work on non-union shingles not bearing the union label.

Page 4, lines 51-55—15. To the finding, conclusion and speculation of the Examiner that it is possible that respondents were “speaking with tongue in cheek” and “that no matter what working conditions might be secured for employees in Canadian

mills, the Respondents would still oppose the processing of the Canadian product by mills in the Washington-Oregon area” on the ground that, as stated by the Examiner in line 55, on page 4, and line 1 on page 5, there is no evidence to support that statement in the record, and on the further ground that it is incompetent, irrelevant and immaterial and sheer speculation upon the part of the Examiner, wholly gratuitous and extraneous.

Page 5, lines 1-4—16. To the finding of the Examiner that “the case here to be decided is distinguishable from the holding of the District Court in *Douds vs. Sheet Metal Workers’ Union*, on the ground that the cited is clearly in point and clearly supports the position of respondents in this case and that respondents’ conduct in this case in no way constitutes a violation of 8 (b) (4) (A) of the Act, and on the further ground that the Examiner, although stating the case to be distinguishable, does not in any way distinguish the decision from the case at bar.

Page 5, lines 6-11—17. Except to the mixed finding and conclusion of the Examiner in the cited lines to the effect that Article VI (c) of the collective bargaining agreement between the employer and respondents herein is a restriction upon respondents to prevent them “from characterizing a product as unfair if it had been produced under ‘fair’ conditions.” on the ground that such a construction wholly divorces the paragraph (Art. VI (c)) from its context and clearly violates the rules of construction of contracts as hereinafter discussed in respondents’ brief, and on the further ground that any common

sense construction of paragraph VI (c) necessarily supports the position of respondents that respondents, even under the very terms of their contract with the employer in this case, were entitled to (had they chosen to do so) instruct the members of respondent union not to work on products not bearing the union label.

Page 5, lines 14-15—18. Except to Examiner's conclusion that the Conway Express case vs. NLRB has no relevance to this case, on the ground that the Conway Express case is clearly in point and clearly establishes, as hereinafter stated in respondents' brief, that respondents committed no violation of 8 (b) (4) (A) of the Act.

Page 5, lines 16-24—19. To the finding and the argument of the Examiner in the cited lines to the effect that there is not the slightest evidence that the employer's threatened misuse of respondents' union label in any way was the cause or one of the causes for the work stoppage in this case, on the ground that the uncontradicted evidence shows that the employer in this case, when the manager of another plant known as the Perma Products, Inc., did, in fact, attach respondents' label to non-union made products and employer knew that in that operation employer was not entitled to the use of respondent union's label and that the evidence further establishes that respondents were compelled to bring action in federal court against the employer in that case in order to enjoin and prevent the employer from using respondent union's label in its operation, and the evidence further establishes that the manager of Perma

Products opened up and managed the operation of the Sound Shingle shortly after the litigation in that case was disposed of. Respondents further object to the conclusion in that paragraph "that respondents did not exercise their right to recall their union label from the employer" in question, upon the ground that no occasion to recall arose, since the Employer actually manufactured and shipped no shakes whatsoever except those bearing, and entitled to bear, the union label; and that the employees here, on the occasion in question, merely chose, as it was their right to do, not to work on non-union, non-label shingles.

Page 5, lines 25-30—20. To the finding and conclusion that the strike in the plant of the employer, beginning on January 11, 1952, was still in effect at the time of the hearing, on the ground that the uncontradicted testimony in the record shows that any and all of the employees who refused to work on January 11, 1952, were in fact, employed by Employer at the time of the hearing or were, in fact, employed in other shake or shingle plants in the Seattle area and on the further ground that there is no evidence in the record to support the conclusion that any strike was still in effect at the time of the hearing, because the evidence is uncontradicted that the work stoppage in question occurred on and was confined to January 11, 1952, and that the refusal to work, if any, by the individual employees in question extended to and embraced one car—and one car only—of shingles which, in truth and in fact, were the property of Sound Shingle and which had been manufactured somewhere in Canada; that there is no

evidence in the record to support the finding that any of the employees of the employer in this case, members of respondent union, did, on January 11, 1952, or on any date subsequent thereto, refuse to perform any service of any character whatsoever, requested of them by their employer, other than their individual refusal to work on one single carload of shingles received at the plant on January 11, 1952, and which shingles were the property of Sound Shingle Co.; that in truth and in fact the evidence shows that each of the employees in question was willing to do and offered to do any work in and about the plant, requested of him or required of him by his employer and that some of the employees in question did, in fact, at the request of the employer, continue to work for the employer in the employer's shingle mill and in enlarging the shake plant subsequent to January 11, 1952, and continued to do so up to the date of the hearing. There is likewise no evidence in the record to support the conclusion of the Examiner that the respondent "had as his object forcing or requiring the employer to cease using, handling or otherwise dealing in the products of North Shore or other Canadian shingle manufacturers and to cease doing business with such Canadian enterprises." That the evidence is clear in the record that the respondents did not know of any business relationship of any nature whatsoever between Sound Shingle and North Shore or any other Canadian shingle manufacturer and there is a total absence of any evidence that respondents had any animus against or dispute with either North Shore or any other Canadian enter-

prise. The evidence is clear that the conclusion of the Examiner in this respect is without foundation. Respondents' concert of action was directed solely against work upon non-union and non-label shingles.

Page 5, lines 33-35—21. To the finding and conclusion "that by inducing and encouraging the employees of Sound Shingle to engage in the strike of January 11, 1952, respondents violated Sec. 8 (b) (4) (A) of the Act." on the ground that there is no evidence in the record to support the conclusion or any evidence upon which the conclusion that respondents violated Sec. 8 (b) (4) (A) of the Act could be predicated.

Page 5, lines 40-45—22. To the finding and conclusion that the activities of respondents set forth in Sec. IV in the Intermediate Report "have a close, intimate and substantial relation to trade, traffic and commerce amongst the several states and territories of the United States and tend to lead to and have led to labor disputes burdening and obstructing commerce in the free flow of commerce" on the ground that there is no evidence to support that finding and conclusion and that at most the evidence shows that four employees refused to unload one car of shingles originating in British Columbia, Canada, and shipped to Marysville, Washington, the contents of which car belonged to Sound Shingle, the employer in this case, and that the incident in question was merely the isolated and sporadic act of four employees of the Employer and that their act in no wise tended

to lead to labor disputes that have in any way burdened or obstructed commerce in the free flow of commerce among the several states and territories of the United States, nor has it done so.

Page 5, lines 49-52—23. To the conclusion in the paragraph that respondents have violated Sec. 8 (b) (4) (A) of the Act and the recommendation of the Examiner stated thereon, on the ground that there is no evidence to support a finding that respondents violated Sec. 8 (b) (4) (A) of the Act.

Page 5, lines 60-61 and page 6, lines 1-15—24. To the conclusions of law stated by the Examiner, on the ground that there is no evidence to support the conclusion of law in the three paragraphs embraced within those lines.

Page 6, lines 19-62 and page 7, lines 1-7—25. To all of the recommendations of the Examiner set forth in the Intermediate Report on the ground that the recommendations therein stated are contrary to law and not supported by the evidence in the record, and on the further ground that under the evidence respondents are, under the law, entitled to have the complaint of the Employer dismissed, upon grounds more particularly appearing in our supporting brief.

The union respondents except to the matters set forth above on the grounds that the foregoing exceptions are not based upon the facts in the record, are contrary to the facts in the record, are not sup-

ported by the evidence on the record considered as a whole, are not in accordance with law, and are contrary to law.

In addition to the foregoing exceptions to the Trial Examiner's Intermediate Report, the union respondents:

1. Except to the Trial Examiner's ruling denying motions by the union respondents at the close of the General Counsel's case in chief.

2. Except to all of the Trial Examiner's rulings respecting the subpoena duces tecum served on a representative of Sound Shingle Co. the employer herein. (Union respondents Exhibit 12 in evidence. Record P. 280.)

Dated: Indianapolis, Indiana, July 2, 1952.

GEORGE E. FLOOD,
WETTRICK, FLOOD & O'BRIEN,
FRANCIS X. WARD,
Attorneys for Respondents.

Certificate of Service attached.

[Title of Board and Cause.]

**RESPONDENTS' EXCEPTIONS TO RULINGS
OF TRIAL EXAMINER UPON THE HEAR-
ING HEREIN.**

Counsel for respondents above named in addition to exceptions to intermediate report hereby except to rulings made by the trial examiner upon respondents' motions and objections at the time of the hearing of the above entitled cause, in the following particulars:

Reference to Record

1. To respondents' motion that the complaint be dismissed upon the grounds that the controversy was moot at the time of the hearing by reason of the fact that the record conclusively shows that the Sound Shingle Company started to operate its shingle plant the last week in January and did operate the same through the month of February and up through and including March 8th of this current year, and that during that time the mill was staffed, pursuant to its collective bargaining agreement with Everett Local 2580, with members of Local 2580. It should also be noted that it was admitted that the few employees who went home on January 11, 1952, were thereafter employed by Sound Shingle and that in fact the management of Sound Shingle put the same men, all members of Local 2580, to work in other places in the shingle mill (Record Page 71). (N.B.: As appears from motion to dismiss concurrently filed herewith, both shingle and shake plants are currently operating.)

2. To the failure of the trial examiner to sustain respondents' objection to that portion of Mr. Martin's testimony appearing on page 14 of this record as to that certain conversation by and between himself and one Mr. Serrett on the ground that the same was hearsay as to these respondents and incompetent to prove any agency existing between Serrett and either of these respondents, since agency can not be proved by the mere self-serving hearsay declaration of the agent.

3. Object to the failure of the trial examiner to admit into evidence respondents' Exhibits 2 and 3 and the failure of the trial examiner to direct the witness Martin to answer the questions propounded to him by respondents' counsel on pages 50, 51, 52, 53 and 54 and the rejection by the trial examiner of respondents' offer of proof on page 55 and 56 on the ground that the testimony called for by the questions, and that the answers that would have been given by the witness to the question so propounded, would have disclosed that these respondents had dealt with Mr. Martin, a partner of Sound Shingle, for a number of years prior to the controversy herein and that during the years 1949, 1950, 1951 and particularly during January of 1952, Mr. Martin was the manager of Perma Products plant at Chehalis; that the Perma Products plant at Chehalis operates non-union and that it had no contract with respondents; that the Perma plant under said Martin's management did in fact purchase shingles from a shingle manufacturer in Seattle, M. R. Smith, to which respondents' labels were unlawfully attached by Perma

Products; and after having processed them, Perma Products shipped them in interstate commerce and particularly to Sacramento, California, in carload lots with respondents' union label illegally attached thereto; that when this unlawful use of respondents' union label by Perma Products, whose manager was and is now, Mr. Martin, one of the owners of Sound Shingle and the principal witness herein, was called to Martin's attention, the latter at first disclaimed any knowledge of the shipment in question and denied on behalf of Perma Products that that company had engaged in unlawfully using respondents' union label; that respondents filed suit for misuse of its label, and marshalled proof thereof, as a result of which Perma Products, of which Martin is Manager, stipulated not to further misuse and misappropriate respondents' union label and an order disposing of such litigation based thereupon was entered. It will be noted that as between North Shore and Sound Shingle, there was no motive for Sound Shingle to have any North Shore shingles processed into shakes, as North Shore had in fact a shake plant (Record page 76). It will be further noted that up until the time of this litigation, Ralph Stuck, the manager of Sound Shingle, admitted that every bundle of shingles and shakes that went out of Sound Shingle plant carried with it respondents' union label (Record pages 111, 112, 113, 114, 116 and 118). Respondents had every reason to believe that Sound Shingle, having the same management as Perma Products, would, if respondents were not alert, unlawfully misappro-

priate and attach its label to any product shipped or processed by it for North Shore.

4. Object to trial examiner's admission into evidence of general counsel's exhibits 2, 3 and 4 offered on pages 84, 85, 86, 87 and 88 of the record and admitted by the examiner (set forth in page 108 of the record) on the ground that said publications are incompetent, irrelevant and immaterial as proof in support of any unfair labor practice as alleged in complaint, as each of the documents purports to be and shows on its face that it is nothing more than a literary publication known as "The Shingle Weaver" published by the respondents' council to advise its members, and such publications are protected by and within the privilege and rule of evidence set forth in Section 8(c) of the act; and 8(c) of the act renders respondents immune from any charge of having committed an unfair labor practice by publishing such publications. Respondents further object to said exhibit on the grounds that same are at most hearsay and on the further ground that to permit such exhibits to constitute any evidence in an unfair labor practice upon the part of respondents would unlawfully burden and deprive respondents of their rights under the First and Fifth Amendments to the Federal Constitution, in that respondents would be deprived of a right to publish a newspaper and urge their views with respect to wages, hours and conditions to their own members and their public at large with respect to labor matters.

5. Respondents except to the failure of the Trial

Examiner to sustain their motion to dismiss the complaint, upon the ground, first, that the complaint itself states no ground upon which a violation of Sec. 8(b) (4) (A) of the Act could be established, and secondly, upon the ground that the evidence produced by the general counsel in support of the complaint failed to establish a violation of Sec. 8 (b) (4) (A) of the Act, on the ground that the evidence conclusively shows: (1) that the transaction here in question was a sporadic act occurring on January 11, 1952, wherein four or five men went home after opening a carload of shingles and finding them not to bear the union label; (2) the evidence conclusively establishes that the carload of shingles in question did, in fact, belong to or were owned by the primary employer Sound Shingle; (3) That there is a total absence of evidence to show that respondents ever heard of or knew about any agreement of any character by and between Sound Shingle and North Shore with respect to this car or any other carload of shingles; (4) That there is a total absence of evidence that respondents had any labor dispute with North Shore or any other Canadian manufacturer of shingles or that respondents at any time ever had any contact with or business relationship of any nature whatsoever with employees of North Shore or any other Canadian manufacturer of shingles; (5) That there is a total absence of evidence to show that respondents had talked to or conversed, through their officers, with any of the employes of Sound Shingle on or about January 11, 1952.

6. Respondents except to the action and the ruling of the Trial Examiner in refusing to issue and/or quash respondents' motion and demand for a subpoena duces tecum directed to John E. Martin, upon the ground and for the reason that it is admitted in the record that the witness, together with records and documents called for, was readily available (R. 205, 206) and that the testimony and the documents called for in the subpoena duces tecum were germane, relevant and necessary to establish the merits of respondents' defense to the charges herein. (R. 256-257.)

That the subpoena duces tecum was called for by respondents in the anticipation that the evidence in response thereto would establish that the Sound Shingle Company, as consignee of such shipment, was the owner thereof; that they bore the trade label of North Shore, Ltd., of Vancouver, B. C., as the manufacturer of such shingles but did not contain on its certificate label the stamp or imprint of the United Brotherhood's union label as is customarily the case in all shingles manufactured fair to the respondents' union under its collective bargaining contracts and that the absence of such a union label was in truth and in fact the cause which prompted the employees in the shake plant to decline to process them. That had such shipment borne the union label, no controversy would or could have arisen.

7. Respondents object to the failure of the Trial Examiner to admit into evidence Exhibits 5, 6, 7

and 8 (R. 162, 163, 193) for the reason that such exhibits are relevant and material to the issues in the controversy, and shed light upon the reason which moved the individual employees in the shake plant to refuse to work upon non-label shingles. That the exhibits, read in integration, impose an obligation upon each member to decline to work upon unfair non-label or non-union products and that this obligation arises out of a contract between the United Brotherhood of Carpenters & Joiners of America and each local of the respondents' union and each individual member thereof, the integrity of which contract is preserved and protected under the Fifth and Fourteenth Amendment to the Constitution of the United States and cannot be impaired by rulings of a trial examiner or an administrative body.

/s/ GEORGE E. FLOOD,
of Wettrick, Flood & O'Brien,

/s/ FRANCIS X. WARD,
Attorneys for Respondents.

United States of America
Before the National Labor Relations Board

Case No. 19-CC-42

In the Matter of WASHINGTON - OREGON
SHINGLE WEAVERS' DISTRICT COUN-
CIL, CHARTERED BY THE UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFFILIATED
WITH THE AMERICAN FEDERATION
OF LABOR; EVERETT LOCAL No. 2580
SHINGLE WEAVERS UNION, UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, A. F. of L., and
JOHN E. MARTIN and FRANK S. BARKER,
Co-partners d/b/a SOUND SHINGLE CO.

DECISION AND ORDER

On May 21, 1952, Trial Examiner Wallace E. Royster issued his Intermediate Report in this case, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, in violation of Section 8 (b) (4) (A), and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief, a motion to dismiss on the ground that the controversy

was moot, and exceptions to the rulings of the Trial Examiner at the hearing. Sound Shingle filed a brief in reply to the motion to dismiss and to the exceptions. The Respondents filed an answer to the Reply Brief. The motion to dismiss on the ground of alleged mootness is denied.¹ We also deny the requests of the Respondents and Sound Shingle for oral argument, because the positions of the parties are adequately developed in the record, exceptions and briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.² The Board has considered the

¹ See Local 74, United Brotherhood of Carpenters & Joiners of America, A.F. of L., et al. vs. N.L.R.B., 341 U.S. 707, 715, enfg. 80 NLRB 533.

101 NLRB No. 203

² Like the Trial Examiner, we find no merit in the Respondents' objections to the receipt in evidence of Union publications to show the union's policy on Canadian and other nonunion shingles. See Int'l Union, United Mine Workers of America, et al. (Jones & Laughlin Steel Corp. et al.), 83 NLRB 916; Int'l Typographical Union, et al. (American Newspaper Publishers Association), 86 NLRB 951. We also deem immaterial the rejected evidence on the Respondents controversy with Perma Products, Inc., of Chehalis, Washington, and whether the carload of shingles received on January 11, 1952, belonged to Sound Shingle or to the Canadian producer. See New York Laundry, Inc., 85 NLRB 1470, and *infra*.

Intermediate Report,³ the exceptions and briefs, the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the following additions and modifications:

We agree with the Trial Examiner's conclusion that the Respondents violated Section 8 (b) (4) (A) of the Act. That section makes it an unfair labor practice for a labor organization or its agents to engage in, or induce or encourage the employees of any employer to engage in

a strike or a concerted refusal in the course of their employment to * * * work on any goods * * * where an object thereof its: (A) forcing or requiring any employer * * * or other person to cease using * * * or otherwise dealing in the products of any other producer * * * or to cease doing business with any other person. (Emphasis added.)

In this case, union members walked off a job ten minutes after they learned that their employer wanted them to work on shingles produced in a

³The Respondents except to the Trial Examiner's commingling findings of fact, conclusions of law, and arguments. Section 8 (b) (6) of the Administrative Procedure Act (5 U.S.C. § 1001, et seq.) requires only that a recommended decision include a statement of "findings and conclusions, as well as the reasons or basis therefore," upon all issues. We are satisfied that the Intermediate Report complies with this requirement.

Canadian mill, because the shingles did not bear the union label. When Sound Shingle tried to get the shake mill started again, District Council President Brown said he wouldn't let the Company run Canadian shingles and admitted "for the record" that he had ordered the men out and wouldn't order them back. The Respondents assert that these facts fail to establish a *prima facie* violation of Section 8 (b) (4) (A). We disagree. Like the Trial Examiner, we are satisfied that the record establishes the essential elements required under this section for making out a *prima facie* case as will appear specifically below:

Despite the Respondents' contention that the employees acted individually in quitting work,⁴ we find, as did the Trial Examiner, that the Respondents induced and encouraged employees to engage in a concerted work stoppage, and that the evidence adduced at the hearing established responsibility on the part of the Respondents for such conduct. In doing so, we rely on the following testimony, all of which was credited by the Trial Examiner: (1) Local 2580's Shop Steward Martin's statement that the men had refused to work because Brown "ordered them not [to];" (2) Shop Steward Martin's strike call in stating, "They are B. C. shingles and we can't do anything with them. We will let them set there;" (3) District President Brown's threat to blacklist employees if they returned to work on Canadian shingles; and (4) District Presi-

⁴ See *Arkansas Express, Inc.*, 92 NLRB 255.

dent Brown's ratification of the work stoppage by telling Martin that he would not let the Company run Canadian shingles and that, "for the record," he had "called the boys off."

We also reject the Respondents' contention that the facts fail to establish an unlawful objective. Clearly, a refusal by Sound Shingle employees to process shingles of another producer for the stated reason that they were non-union was aimed at forcing Sound Shingle to cease using the products of such other producer and, to that extent, to cease doing business with it. The conduct here was consequently for an object prescribed by the Act.⁵

As to the Respondents' assertion that the evidence failed to establish a *prima facie* case because the "other producer" is a foreign corporation, that fact does not remove the conduct beyond the reach of 8 (b) (4) (A). Although the Board does not have jurisdiction over foreign manufacturers as such, it does have jurisdiction over unfair labor practices occurring in this country and affecting foreign commerce.⁶

⁵Roy Stone Transfer Corporation, 100 NLRB No. 137.

⁶See *Moore Dry Dock Company*, 92 NLRB 547, at footnote 17; *Morris Grain Co. vs. Nordaas*, 46 N.W. 2d 94, 102-104 (Minn. 1950); Sections 2 (6), (7), and 10 (a); Cf. *Al J. Schneider Company*, 87 NLRB 99, 89 NLRB 221, which, unlike this case, involved an organization expressly excluded from the definition of "employer" and not enumerated as a "person" in Section 2 (1).

The Respondents contend that the strike here was privileged because it was allegedly against a primary employer; they also urge the contract or its breach as a defense. Like the Trial Examiner, we find these defenses without merit.

It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business dealings, to force a cessation of business with the primary employer. But because this kind of secondary boycott is more usual or more frequent does not mean that it is the only kind Congress intended to reach. We do not believe that, as to the type of conduct now before us, Section 8 (b) (4) (A) contemplates the existence of an active dispute, over specific demands, between the union and the producer of the goods under union interdict. The legislative history surrounding the enactment of Section 8 (b) (4) (A), while difficult as a guide in many respects, does furnish reasonably clear guidance on the precise issue here. The Senate Committee Report on this section indicates that no demand upon the producer of the boycotted product is necessary to sustain the charge that a union has engaged in the type of "secondary boycott" we have here under consideration.

In S. Rep. No. 105 on S. 1126, 80th Con., 1st Sess., p. 22, the Committee said:⁷

⁷ See also H. R. No. 245 on H. R. 3020, p. 23, and minority report, at p. 72.

“Thus, it would not be lawful for a union to engage in a strike against Employer A for the purpose of forcing that employer to cease doing business with B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute). This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3.” * * * [Allen Bradley vs. Local Union 3, I.B.E.W., 325 U.S. 797.] (Emphasis added.)

An examination of the Allen-Bradley case shows that Local No. 3 made no express or implied demands on the manufacturers whose products they refused to install.⁸ Our dissenting colleague, in rejecting that case as illustrative because Section 8 (b) (4) (A) does not proscribe the methods used in that case, overlooks the fact that this in no way impairs it as an example of the type of secondary boycott in which Congress indicated it would be

⁸ See *Roane-Anderson Company*, 82 NLRB 696, 711.

an “unfair labor practice for a union to engage in.”

Moreover, the present case seems precisely that described by Senator Taft as a further example of the conduct proscribed, when he said (93 Cong. Rec. 4199):

“For instance, all over the United States, carpenters are refusing to handle lumber which is finished in a mill in which CIO workers are employed, or, in other cases, in which American Federation of Labor Workers are employed * * * [Because the carpenters] do not like the way some other employer is treating his employees, they [cannot] promote strikes in any other plant which happens to be handling the product of the plant whose management [they] do not like.”

Indeed, in the legislative history of Section 8 (b) (4) (A), the proponents of the amendments to the Act listed as typical union conduct barred by that section the kinds of product boycotts which are indistinguishable from the one engaged in here. If there is any doubt remaining that a product boycott of the type is issue here is unlawful under Section 8 (b) (4) (A), the following statement by Senator Taft on the floor of the Senate, made by way of explanation of what that section was intended to proscribe, effectively removes it:

“Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are

satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that." (Emphasis supplied.)⁹

Thus, the legislative history amply demonstrates that when a union causes employees to refuse to work on the products of any producer other than their employer because that product is, as here, nonunion, and it does so with the object of causing their employer to cease using the product of, or doing business with, the other producer, that

⁹93 Cong. Rec. 4323.

conduct constitutes a secondary boycott of the type which Section 8 (b) (4) (A) was intended to proscribe.

Under the circumstances, and on the basis of the entire record, we conclude that the Respondents induced and encouraged employees of the Employer to engage in a concerted refusal in the course of their employment to work on goods where an object thereof was to force or require the Employer to cease using or otherwise dealing in the products of any other producer, in violation of Section 8 (b) (4) (A) of the amended act.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Washington-Oregon Single Weavers' District Council and Everett Local 2580 Shingle Weavers' Union, their agents, successors, and assigns of each, shall:

1. Cease and desist from engaging in or inducing or encouraging their members to engage in a strike or a concerted refusal in the course of their employment to perform services for Sound Shingle Co. or any other employer where an object thereof is to require such employer or employers to cease doing business with North Shore Shingle Co., Ltd., or other Canadian shingle manufacturers.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Notify all members of Local 2580 that they are free to work for Sound Shingle Co. and that such employment will not prejudice their rights, privileges, or standing in either Local 2580 or the District Council;

(b) Notify Sound Shingle Co. that it will not induce or encourage employees of that partnership to engage in a strike or a concerted refusal in the course of their employment to work upon or otherwise handle products of North Shore Shingle Company, Ltd., or other Canadian shingle manufacturers for the purpose of requiring Sound Shingle Co. to cease doing business with any Canadian shingle manufacturer;

(c) Post in conspicuous places at the business office of Local 2580 in Everett, Washington, where notices to members are customarily posted, and distribute for posting to all locals affiliated with the District Council, a copy of the notice attached to the Intermediate Report as "Appendix A."¹⁰ Copies

¹⁰This notice is amended by substituting for "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decison and Order" "A Decree of the United States Court of Appeals Enforcing."

of notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed by a representative of the District Council and one of Local 2580, be immediately posted and maintained for a period of sixty (60) days thereafter. Reasonable steps shall be taken by the Respondents to insure that the notices are not altered, defaced, or covered by other material;

(d) Notify the Regional Director for the Nineteenth Region (Seattle, Washington), in writing, within ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

Signed at Washington, D. C., Dec. 19, 1952.

PAUL M. HERZOG, Chairman,
PAUL L. STYLES, Member,
IVAR H. PETERSON, Member,
[Seal] NATIONAL LABOR RELATIONS
BOARD

Abe Murdock, Member, dissenting:

The real issue in this case, in my opinion, is whether the Respondents have engaged in a secondary boycott or merely in a primary strike for the preservation of employment for their own members. If this is not the issue then all of the Board's previous decisions interpreting Section 8 (b) (4) (A) are wrong. For the Board has consistently held that this Section of the amended Act was intended to forbid secondary, but not primary activity by a labor organization. If I read this de-

cision of the majority correctly, the Board is now holding that a union has violated Section 8 (b) (4) (A) when the only "active" dispute in which it is involved is one with the employer for whom its members refuse to work. That dispute related here to the use by the Employer of Canadian rather than American shingles in an American mill. Of course, the Respondents' general argument in support of their demand was that the standards of Canadian workmen were inferior to those of American workmen and competition from this foreign source was therefore "unfair." This is the traditional position of those who advocate protection of American industry and the high standards of American workmen. Whether this policy is right or wrong is, to be sure, a matter for Congress to determine. But suppose, for example, a group of American workmen struck because their employer insisted on importing and using Czechoslovakian findings in his shoe factory. If the employees protested at any time that those products were "nonunion" and their use would undercut working conditions in the United States, under the majority's decision the union representing those employees would, ipso facto, be guilty of violating Section 8 (b) (4) (A). I cannot believe, and I find nothing in the legislative history of this Section of the amended Act to indicate, that Congress intended to proscribe such concerted activity of a labor organization as a secondary boycott.

The job of distinguishing between forbidden "secondary" and permitted "primary" activity is ad-

mittedly difficult and perplexing. The Board has already gone far in spelling out specific rules of this kind in cases involving the picketing of ships and trucks before the premises of secondary employers.¹¹ Why should this case be different? The majority rely primarily, if not completely, upon several sentences from the voluminous legislative history of this Section of the Act. The first is a reference to the Allen-Bradley case, a case in which a labor organization and a number of employers were charged with a violation of the Sherman Anti-Trust Act because they conspired to exclude from use in the City of New York articles of commerce made outside the city. Certainly, the facts in this case are a far cry from those in the Allen-Bradley decision. There is nothing in the nature of a conspiracy between employers and labor organizations in this case. All that is involved here is a primary dispute between the Respondents and the Sound Shingle Company over the latter's determination to use Canadian rather than American shingles in its mills. Section 8 (b) (4) (A) is not directed against this type of primary activity. The second sentence of the legislative history, the majority contend, describes "precisely" the instant case. There Senator Taft attempted to illustrate the evils of jurisdictional strikes among A. F. of L. and C. I. O.

¹¹ See e.g., *Sailors Union of the Pacific (Moore Drydock Co.)* supra; *Schultz Refrigerated Service, Inc.*, 85 NLRB 502; *Sterling Beverages, Inc.*, 90 NLRB 401.

unions. In a third quotation from Senator Taft the majority emphasizes, I think, the wrong sentence. Senator Taft there argues that employees should not be encouraged to strike “because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike.” I submit that Senator Taft was reaching for a secondary boycott definition which, as he later explained more explicitly, included the factor of an actual dispute between the union and the primary employer it did not “like.” There are other, and I think better, bits of legislative history to indicate more “precisely” the nature of a secondary boycott. The classic example was stated by Senator Taft as follows:¹²

“This provision [Section 8 (b) (4) (A)] makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.”

Senator Ball, another vigorous proponent of the Act, stated on several occasions during debate in the Senate on this Section that in his view a secondary boycott was the attempt of a labor organization to secure control over the employees of the primary employer:

¹² 93 Cong. Rec. 4323.

“ ‘Secondary boycotts’ and ‘jurisdictional strikes’ have been defined by me on the floor of the Senate, and I think the definitions are substantially correct. It is the attempt by the employees of employers A, B and C, through their union to dictate not to employer X but to his employees, the terms and conditions of the Union under which they shall work. Basically the primary objective of the majority of jurisdictional strikes and secondary boycotts is not the employer, but the employees, over whom control is sought.”¹³

I am not prepared to say that this legislative history precisely defines conduct forbidden by Section 8 (b) (4) (A). I am prepared to draw from it no more than the Board has already drawn, that is, an intent on the part of Congress to forbid “secondary boycotts.” There are, unfortunately, few guideposts to assist the Board in defining this term with the specificity and precision that a fair interpretation of this Act requires. Judge Learned Hand has said:¹⁴

“The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the em-

¹³ 93 Cong. Rec. 5147. See, also, 93 Cong. Rec. 7683; 93 Cong. Rec. A 2377.

¹⁴ *International Brotherhood of Electrical Workers, Local 501, et al., vs. National Labor Relations Board* 181 F. 2d 34 (C.C.A. 2); affirmed 341 U.S. 694.

ployer in the hope that this will induce the employer to give in to employees' demands."

Following this eminent authority, the court in *Douds v. Sheet Metal Workers* held:¹⁵

"Such a [secondary] boycott exists when a labor organization having a labor dispute with employer A induces or encourages employees of employer B, with whom the union has no dispute, to refuse to handle goods or perform services for employer B, with the object of causing B to cease doing business with A, the employer with whom the union is involved in a labor dispute."

Both of these definitions contemplate the existence of a primary employer, a secondary employer or neutral party, a dispute between the union and the primary employer, and pressure by the Union upon the employees of the secondary employer or neutral party to compel a settlement of its dispute with the primary employer. I do not believe the Board should disregard these authorities on the basis of fragmentary and inconclusive quotations from the legislative history. For my part, while there may be other cases not so easily decided, I am satisfied to apply Judge Hand's definition to this case, for it seems to me dispositive of the question.

In my opinion, the General Counsel has failed to

¹⁵ *Douds vs. Sheet Metal Workers Union*, 101 Fed. Supp. 273, rehearing 101 Fed. Supp. 970 (D.D. E.D. N.Y.).

establish on this record that an active dispute existed between the Respondents and the Canadian producers of the boycotted products. I am firmly convinced that the refusal of Respondent's members to work for their Employer constituted in this case no more than primary action by American workmen to insure the use of American manufactured shingles in American mills. I would therefore dismiss the complaint.¹⁶

Signed at Washington, D. C., Dec. 19, 1952.

ABE MURDOCK,
Member

¹⁶ Under this view of the case it is unnecessary for me to reach and I therefore do not pass upon the question whether the contract clause would constitute a defense to this complaint.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD

Petitioner,

vs.

WASHINGTON-OREGON SHINGLE WEAVERS'
DISTRICT COUNCIL and EVERETT
LOCAL 2580 SHINGLE WEAVERS' UNION,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Washington-Oregon Shingle Weavers' District Council, Chartered by the United Brotherhood of Carpenters and Joiners of America, Affiliated with the American Federation of Labor, Everett Local 2580 Shingle Weavers Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L. and John E. Martin and Frank S. Barker, Co-partners doing business as Sound Shingle Co.," Case No. 19-CC-42 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including

also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Wallace E. Royster as Trial Examiner for the National Labor Relations Board, issued April 24, 1952.

(2) Stenographic transcript of testimony taken before Trial Examiner Royster on April 24 and 25, 1952, together with all exhibits entered in evidence as well as rejected exhibits.

(3) Copy of Trial Examiner's Intermediate Report (annexed hereto to item No. 21), and Order transferring case to Board, both dated May 21, 1952, together with affidavit of service and United States Post Office return receipts thereof.

(4) Motion by Respondents, Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers Union (hereinafter called Respondent Unions) to extend time for filing exceptions and briefs, received June 5, 1952.

(5) Copy of Board's telegram dated June 5, 1952, extending time for filing exceptions and briefs to June 20, 1952.

(6) Motion by Charging Party John E. Martin and Frank S. Barker, Co-partners doing business as Sound Shingle Company (hereinafter called Charging Party), for leave to file a reply brief, received June 9, 1952.

(7) Copy of Board's letter dated June 11, 1952, denying Charging Party's motion to file reply brief.

(8) Stipulation dated June 12, 1952, by and between Respondent Unions and Charging Party, ex-

tending time to file exceptions and briefs to July 14, 1952.

(9) Copy of Board telegram dated June 17, 1952, extending the time for filing exceptions and briefs to July 7, 1952.

(10) Respondent Unions' letter received July 3, 1952, requesting permission to argue orally before the Board (denied, see Decision and Order, page 1, paragraph 1).

(11) Respondent Unions' Exceptions to Intermediate Report received July 3, 1952.

(12) Respondent Unions' Exceptions to Trial Examiner's rulings upon the Hearing, received July 7, 1952.

(13) Charging Party's letter received July 25, 1952, requesting permission to argue orally before the Board, (denied, see Decision and Order, page 1, paragraph 1).

(14) Charging Party's motion for leave to file reply brief received July 25, 1952.

(15) Respondent Unions' motion to dismiss received July 28, 1952 (denied, see Decision and Order, page 1, paragraph 1).

(16) Charging Party's affidavit in opposition to motion to dismiss received July 28, 1952.

(17) Copy of Board's telegram dated July 29, 1952, granting Charging Party permission to file reply brief by August 5, 1952.

(18) Respondent Unions' motion to strike Charging Party's affidavit in opposition to motion to dismiss received August 1, 1952 (motion to dismiss denied, see Decision and Order, page 1, paragraph 1).

(19) Respondent Unions' telegram received August 12, 1952, requesting permission to file reply brief.

(20) Copy of Board's telegram dated August 12, 1952, granting Respondent Unions permission to file reply brief by August 19, 1952.

(21) Copy of Decision and Order issued by the National Labor Relations Board on December 19, 1952 (with Intermediate Report annexed thereto), together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this day of

[Seal] /s/ OGDEN W. FIELDS

Executive Secretary,

National Labor Relations Board

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CC-42

In the Matter of WASHINGTON - OREGON
SHINGLE WEAVERS' DISTRICT COUN-
CIL, CHARTERED BY THE UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFFILIATED
WITH THE AMERICAN FEDERATION
OF LABOR; EVERETT LOCAL No. 2580
SHINGLE WEAVERS UNION, UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, A. F. of L., and
JOHN E. MARTIN and FRANK S. BARKER,
Co-partners d/b/a SOUND SHINGLE CO.

TRANSCRIPT OF PROCEEDINGS

Room 407G, U. S. Courthouse, Fifth & Spring St.,
Seattle 4, Wash., Thursday, April 24, 1952.

Pursuant to notice, the above-entitled matter came
on for hearing at ten o'clock, a. m.

Before: Wallace E. Royster, Esq., Trial Examiner.

Appearances: James V. Constantine, Esq., Wash-
ington 25, D. C., appearing as General Counsel on
behalf of the National Labor Relations Board.
George E. Flood, Esq., 805 Arctic Building, Seattle
4, Wash., [1*] appearing for Respondents. Francis

* Page numbering appearing at top of page of original Re-
porter's Transcript of Record.

X. Ward, Esq., 222 East Michigan Street, Indianapolis, Indiana, appearing as General Counsel in behalf of the Respondents. Mary Ellen Krug, Esq., 657 Colman Building, Seattle 4, Washington, of McMicken, Rupp & Schweppe, appearing for the Sound Shingle Company, the Charging Party.

* * * * *

(The documents heretofore marked General Counsel's Exhibits 1-a through 1-K inclusive for identification, were received in evidence.)

* * * * *

JOHN E. MARTIN

a witness called by and on behalf of the General Counsel, [10] being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Will you state your name, please?

A. John E. Martin.

Q. Where do you live, Mr. Martin?

A. In Chehalis, Washington.

Q. And you are a partner in a mill known as the Sound Shingle Company.

A. I am.

Q. Who else is there with you in that partnership?

A. Frank S. Barker.

(Testimony of John E. Martin)

Q. Just the two of you? A. Yes, sir.

Q. And the Sound Shingle Company is located where?

A. In Marysville, Washington.

Q. What kind of business does the Sound Shingle Company do?

A. We manufacture red cedar shingles and machine grooved shakes.

Q. Do you have separate mills for each operation? A. Yes, sir.

Q. Do you have a shingle mill?

A. A shingle mill and a shake plant.

Q. The shake plant is a separate building? [11]

A. It is in a separate building and it is a separate operation.

Q. How long has the partnership been in existence? A. Since April 1, 1951.

Q. And the partnership is engaged in no other business? A. That is right.

Q. And has not been engaged in any other business? A. No.

Q. Now, sometime around April 1st, of what year was that? A. 1951.

Q. And that is when you organized the partnership? A. That is right.

Q. Around April 1st, or perhaps a little before it, did you have some talk with a representative of one of the respondents in this case?

A. Well, in January of 1951 Mr. Barker and I originally purchased this mill and we formed a corporation.

(Testimony of John E. Martin)

Q. Can you answer the question? Did you have a talk with some representatives of one of these unions here sometime before April 1st?

A. Yes.

Q. What was the man's name?

A. Paul M. Sarrett.

Mr. Flood: Just a minute. I am not aware that Mr. Sarrett is a party respondent here. [12]

Mr. Constantine: Shall I go on, Mr. Examiner?

Trial Examiner Royster: Go ahead.

Q. (By Mr. Constantine): Who is Mr. Sarrett? Do you know what position he has and in what union?

A. He is a field representative of the Washington-Oregon's District Council.

Q. About when was it that you had a talk with him?

A. The end of the latter part of January of 1951.

Q. Did he talk to you or did you go to him?

A. He called on me at my office in Chehalis, Washington.

Q. Do you know Mr. Sarrett? A. Yes sir.

Q. Now, will you briefly give the conversation that you had with him on that day?

A. Well, Mr. Sarrett came in and he said, "I understand that you are buying a shingle mill up at Marysville, Washington?" and I said "Yes". "Mr. Barker and I are buying it." And he said, "Well, I just want to give you a warning that if you intend to run any Canadian shingles up there the union is not going to allow you do it." He said "We will

(Testimony of John E. Martin)

stop you and shut the plant down if you ever attempt to run a car of Canadian shingles into there.”

Q. By “in there” he meant what?

A. Pardon me.

Q. “Up there” meant what? [13]

A. At Marysville, Washington, at the new plant that we buying.

Q. That is the Sound Shingle Company?

A. The Sound Shingle Company. [14]

* * * * *

Q. (By Mr. Constantine): Now, at some time in 1951 did Sound Shingle enter into a contract with a North Shore Shingle Company, Ltd., of British Columbia, in Vancouver, Canada? A. Yes.

Mr. Flood: When was the date?

Q. Trial Examiner Royster: Some time in 1951. Is that what you said?

Q. (By Mr. Constantine): Do you remember about when that was?

A. It was around the 1st of December.

Q. And that was a written or an oral contract?

A. That was an oral contract, an oral agreement.

Q. And what was the agreement? [18]

A. Well, the agreement was that we were to groove shakes for them, using their shingles and re-ship them to their customers throughout the different states in the United States.

Q. In other words, North Shore would ship its shingles to you? A. That is right.

Q. At Marysville?

A. Yes, that is right.

(Testimony of John E. Martin)

Q. And then, what exactly would your firm do in Marysville?

A. We would process them and groove them and make shakes out of the plain shingles.

Q. And thereafter what would happen to the shingles?

A. We would ship them on their orders to various customers in the United States.

Q. Directly from your plant in Marysville?

A. Well, some of them would be directly from our plant and some of them were to go to a staining plant in Seattle in transit.

Q. That was not your staining plant?

A. No.

Q. All right, now. Pursuant to that contract, did your plants receive any Canadian shingles from North Shore?

A. Yes, we did.

Q. I hope the examiner will allow me to refer to the North [19] Shore Shingle Company as North Shore. And when did those shingles arrive?

A. On January 11th, 1952.

Q. Do you know what the, what the quality was?

A. Yes.

Q. Was it 1, 2, 3 or less cars? A. One car.

Q. One full car? A. Yes, sir.

Q. Railroad car? A. Yes, sir.

Q. That came by what railroad?

A. Great Northern, directly from British Columbia.

Q. Directly from British Columbia?

(Testimony of John E. Martin)

A. Directly from Vancouver, B. C. From the North, from North Shore, Vancouver, B. C.

Q. Now, at some time on January 11th, did you receive a call from Ralph Stuck? A. Yes, sir.

Q. Where were you at the time?

A. At my office in Chehalis, Washington.

Q. Who is Ralph Stuck?

A. Ralph Stuck is office manager for Sound Shingle Company. [20]

Q. And what did Mr. Stuck tell you?

A. Mr. Stuck told me that the car of Canadian shingles had arrived.

Mr. Flood: I object to what Mr. Stuck told him.

Trial Examiner Royster: As proving the truth of what Mr. Stuck said I think your objection is sound.

Mr. Constantine: I will not offer it for the truth. I will offer it only to show that a conversation occurred, Mr. Examiner.

Mr. Flood: All right, that is already in and admitted.

Trial Examiner Royster: All right, there is a conversation.

Mr. Constantine: May I have the conversation or no?

Trial Examiner Royster: Why?

Mr. Constantine: Well, I would like to show that it lead up to a telephone call with the union officials, your Honor.

Trial Examiner Royster: He had a conversation so then he made a 'phone call.

(Testimony of John E. Martin)

Mr. Constantine: All right.

Q. (By Mr. Constantine): As a result of the conversation with Mr. Stuck did you call up any member of one of these unions or any officers of these unions who are respondents here? [21]

A. Yes.

Q. Whom did you call?

A. I called Mr. Arthur Brown.

Q. And he has already been identified. Where did you call him?

A. I reached him at Bellingham, Washington.

Q. When?

A. On Friday night, January 11th, 1952.

Q. All right, now. Did you have any talk with him? A. Yes.

Q. That was over the telephone?

A. Yes, sir.

Q. Will you state the substance, if you can, of what the conversation was about?

A. I told Art that the workmen of that Sound Shingle Company had walked off the job because we had brought in a car of Canadian shingles and I understood that they had instructions not to process them from the union. And Art Brown said, "Yes", he said "when you first bought the mill I ordered the boys not to run any Canadian shingles and that if you attempted to bring any Canadian shingles in there that they should walk off the job".

Q. Is that about the substance of the conversation?

A. No, I said "Well, Art, what about the firms down in Seattle; there are three or four of your

(Testimony of John E. Martin)

union mills in [22] Seattle running Canadian shingles. You are letting them run them. Why don't you let us run them?" "Well, we are going to stop them too," he said.

I reached, I reached him at the Union's annual convention in Bellingham, is where I talked to him from, and he said that they had just asked that convention to pass a resolution authorizing the hiring of four more men to do the same thing that Mr. Sarrett has been doing to work in the eastern part of the country to stop the sale and use of Canadian shingles in this country. He said "We have got them stopped in California" and he said "We are going to stop them every place", so "we will stop those firms in Seattle too."

Q. Was there any further conversation?

A. Well, at that time, yes, there was quite a bit but just argument back and forth. I think it was mostly repetition of what has been said.

Q. All right, now. Shortly thereafter, either that day or the next day you instructed Mr. Stuck and arranged for a conference with Mr. Brown? Just say yes or no.

A. Yes.

Q. And was a conference arranged?

A. Yes.

Q. For when?

A. For, I believe, 4:00 o'clock Sunday afternoon, [23] January 13th, 1952.

Q. All right. Now, where was the conversation or the conference scheduled for? What place?

(Testimony of John E. Martin)

A. For the Sound Shingle Company's office in Marysville.

Q. Did you go there on Sunday, January 13th?

A. Yes, sir.

Q. Who else was present when you went there?

A. Well, I went and I was accompanied by my wife and Dick Tidy who is now our superintendent, and when we arrived there Ralph Stuck was there also was Frank S. Barker, my partner.

Q. Now, the union men were not there yet?

A. No.

Q. Did they arrive?

A. Yes. They arrived later.

Q. About what time?

A. About, I would say, between 4:00 o'clock p.m. and 4:30 o'clock p.m.

Q. Who arrived?

A. Mr. Brown and Mr. Uttley.

Q. All right. Was there any conversation at that time?

A. Well, Mr. Brown said that he was too tired to do any talking that afternoon and that he would rather postpone it because one of the men affiliated in the shingle business had died and he wanted to go over there and pay his [24] respects and he would rather postpone this, and I said "Well, come in, Art, I would like to get this shake plant running Monday" which was the next day. I said "We are losing some money" and he said "Well, we will discuss that tomorrow any time that is convenient to you."

(Testimony of John E. Martin)

Q. Is that about all the conversation?

A. That was about all that I can recall at that time.

Q. Was there an agreement made at that time for any meeting the next day?

A. Yes. We arranged for a meeting at 4:00 o'clock the next day. That would be Monday, January 14th.

Q. And was Mr. Uttley there when this meeting occurred?

A. Yes. Mr. Uttley said that he quit work—we wanted to meet originally about 3:00 o'clock and Mr. Uttley said that he was working and would not quit work until about 2:45 o'clock p.m. and he wanted time to go home and to clean up before the meeting.

Q. So Mr. Brown and Mr. Uttley did not stay long?

A. No.

Q. They left in a few minutes after?

A. Yes.

Q. Are those the only union, the only union people who came to the office that day?

A. No. There were some other ones that came later.

Q. Who came? [25]

A. Mr. Sarrett.

Q. About how long after Mr. Brown and Mr. Uttley had left?

A. That was, I would say, about within half an hour afterwards. It was probably about 5:00 p.m. or 5:30 p.m.

(Testimony of John E. Martin)

Q. And did you have a talk with or did anyone else in the office have a talk with Mr. Sarrett?

A. Well, I introduced Mr. Sarrett to everybody there. I guess I was the only one who knew him.

Q. When you say "everybody there" were the same people there? A. Yes.

Q. Except for Mr. Brown and Mr. Uttley?

A. That is right.

Q. That is your wife was there? A. Yes.

Q. And Frank Barker? A. Yes.

Q. And Mr. Tidy and Mr. Stuck?

A. Yes.

Q. All right. And you?

A. Yes. And we had some discussion about the situation about the union closing us down and about why we could not use Canadian shingles when the other mills were using them without opposition from the union and Mr. Sarrett said [26] "Well, this is getting too deep for me". He said "You fellows kind of outnumber me". He said "I have a fellow out here in the car that knows probably more about this than I do" and he went out to the car to bring him in.

Q. And he brought someone in?

A. He brought a fellow in and he introduced him as Fred Baker who was a member of the Shingle Weavers' District Council. As I understand it, representing the district from Oregon.

Q. All right. Did you have any conversation with either Mr. Sarrett or with Mr. Baker after that? A. Yes, I did.

(Testimony of John E. Martin)

Q. When I say "after that" I mean after they came in the same day? A. Yes.

Q. All right. A. That same day, yes.

Q. Will you state that conversation?

A. Well, Mr. Baker came in and was introduced to us and I said "Well, Mr. Sarrett went out to get you to kind of back him up on this". I said "We are having a little trouble" and he said "Yes, I know. I am aware of your trouble". And I said "Well, the question, the question we have been trying to find out is why we can't use Canadian shingles when four or five other union shake plants in the [27] Seattle district are using them with the union's consent". And Mr. Baker said, "Well, it is against union policy to permit anybody to use Canadian shingles where we can stop them and I was not aware of the fact that they were using Canadian shingles in Seattle". And he turned to Mr. Sarrett and he said, "Is that true?" And Sarrett said "Yes". He said, "I must admit it is true, but they are using them occasionally." And I said, "What do you mean 'occasionally'? Color Shake Corporation in Seattle is using Canadian shingles almost exclusively". And Mr. Baker turned to Mr. Sarrett and he said, "Is that true?" and Mr. Sarrett said, "Yes, that is true." He said, "Art Brown made some kind of a special deal with them".

Q. Was there any other conversation?

A. Well, yes, there was quite a conversation there. I told them that, I asked them "Well, why do you object to the, to our use of the Canadian

(Testimony of John E. Martin)

shingles''? And they explained that the Canadian shingles were unfair and the reason they were unfair is because they did not have the same wages and the same hours and the same working conditions as the American mills had here under the shingle laborers' union and that until such time as they did have the same wages, hours and working conditions they would oppose the use of Canadian shingles anywhere in this country where ever they could stop it. And they also told me that at the [28] convention from which they were just returning from Bellingham they repeated the same thing that Mr. Brown had told me that they had just passed a resolution up there authorizing the employment of four more men to cover the United States for the purpose of stopping the sale and use of Canadian shingles in the United States.

They repeated that, Mr. Sarrett especially said he had very good success in stopping the sale and use of Canadian shingles in California and that because of that success they thought that it would be worthwhile to hire four more men because he could not possibly cover the United States all by himself, and then I pointed out——

Mr. Flood: Now just a moment, Mr. Examiner. That is a long answer for just one question. A great deal of it is volunteer and self-serving argument.

Mr. Constantine: The question is the conversation, Mr. Examiner.

Trial Examiner Royster: That is what I understood it to be. And I understood that that is what

(Testimony of John E. Martin)

the witness was giving us. The conversation that occurred on this afternoon of January 13th between Mr. Baker and Mr. Sarrett and the witness and others.

Go ahead.

The Witness: I pointed out to Mr. Baker and to Mr. Sarrett that these particular shingles that we had sitting [29] in the car which the union refuses to allow us to process were union made. I said, "This North Shore Shingle Company has a contract with the C.I.O. union up there and they are absolutely union made." And he said, "That does not make any difference to us. We don't recognize the C.I.O. union in Canada."

Q. (By Mr. Constantine): You say that he said. Who was it who said that?

A. Well, Mr. Sarrett.

Q. All right.

A. Mr. Baker backed him up in everything that he said. He concurred with him.

Q. All right. Did they reply to your statement when you said these words, "C.I.O.-made shingles"?

A. Yes. Mr. Sarrett said "Well, that doesn't make any difference to us. We don't recognize the CIO unions in Canada.

Q. Was there any further conversation?

A. Yes.

Q. All right. Let's have that please.

A. I then said, "Well, there are several mills in Canada who have contracts with the A. F. of L. which the Shingle Weavers' Union is affiliated

(Testimony of John E. Martin)

with” and pointed out that one of them was Hunting-Merritt with whom I had done business and asked them would it be alright for us to run shingles [30] from Hunting-Merritt’s Mills.

Q. When you say “running” that is a work of art? A. I mean process.

Q. It means process?

A. It means process. To process them and to groove them into shakes.

Q. All right.

What did they reply to that question?

A. Mr. Sarrett said “No”. He said, “No, you can’t run any Canadian shingles. It doesn’t make any difference if they are A. F. of L.” And I said, “Well, why not? It is the same union as you have?” “No,” he said, “it is not.” He said, “They don’t have a contract with the Washington - Oregon Shingle Weavers’ Council”, and he said “They don’t pay the same wages or they don’t have the same hours, the working conditions as we have.” And he said “We have been working on them for quite some time to get their standard up to ours and until such time as we, we can get the mills to sign a contract with us and agree to the same wages, hours and working conditions we absolutely won’t allow you to run them”.

Q. Was there any other talk?

A. I cannot recall any more after that point. There was a lot of talk in between but I can’t recall anything else.

Q. Did either one of them mention this, specific

(Testimony of John E. Martin)

wages [31] or the specific hours or working conditions which they claimed were different from that in America?

A. Well, yes. In the course of the conversation they did say that their long hours, eight hours a day is what they are working and they considered that long hours.

Q. Eight hours a day where?

A. In Canada. They are working eight hours a day in Canada. And what they wanted to do is to get this down to a six-hour day like we have in the States here and a thirty-hour week, and there was not any mention made of the exact amount of wages but they say "those low wages" and they always refer to it as "that cheap foreign competition".

Q. During this conversation they said that?

A. Oh, yes.

Q. All right.

Now, you stated a moment ago that there was an agreement to meet with the union representatives on January 14th which was the next day, Monday.

A. Yes.

Q. Was such a meeting held?

A. Yes. It was.

Q. Where was it held?

A. At the Sound Shingle Company's office in Marysville, Washington.

Q. At about what time? [32]

A. About 4:00 o'clock in the afternoon.

Q. Who was present there on behalf of the Company?

(Testimony of John E. Martin)

A. Well, Stuck; Dick Tidy and myself.

Q. Now, we will identify them again. Well, Stuck is you office manager and Mr. Dick Tidy is the superintendent. And who was there on behalf of the union? A. Mr. Brown, Mr. Uttley.

Q. They have already been identified? Was there anyone else? A. And John A. Martin.

Q. What is his middle initial?

A. John A. Martin.

Q. And what is his position in the union?

A. He is the shop steward in the shake plant.

Q. In your shake plant? A. Yes, sir.

Q. Sound Shingle's shake plant?

A. Yes, sir.

Q. And was there anyone else?

A. Bill Conrad, the shop steward in our shingle mill.

Q. And when you say "shop steward" you mean shop steward of Local 2580? A. That is right.

Q. Does Sound Shingle have a collective bargaining contract with Local 2580? [33]

A. Yes.

Q. With Local 2580 and the District Council?

A. Yes, we do.

Q. All right. It had at that time?

A. Yes, sir.

Q. Now, was there any conversation when Mr. Brown, Mr. Uttley, Mr. John A. Martin and Mr. Conrad came in? A. Yes.

Q. Do you recall what it was?

A. Yes, I do.

(Testimony of John E. Martin)

Q. Will you give the substance of it?

A. Well, they came in and that was the first time that I had met Mr. John A. Martin and Mr. Bill Conrad officially. I did not know who they were but they introduced me to them and we talked about generalities for a while and finally Art Brown said, "Well, Martin, what have you got on your mind?" And I said, "Well, Art, I would like to get the shake plant running. That is the only thing that I have on my mind." And he said, "Well, if you want to get your shake plant running, the only way that you can do it is to start your own mill up to process your own shingles or to buy American-made shingles. We will never allow you to process any Canadian shingles in this plant". And I asked Art, "Well, why don't you allow us to process them when you allow [34] the other mills in the Seattle district to process them?" And he again repeated the same thing that they had hired four more men at the recent convention in Bellingham to stop the sale and they were going to stop the plants in Seattle from using them too. I then pointed out to Art Brown that we had a contract with the North Shore Shingle Company to process their shingles and to re-ship them and that this was the first car that came in under that contract, and that we had also contemplated building a staining plant because we had also agreed to stain their own shakes for them, and Art Brown said, "Well, if you intend to work on Canadian shingles you had better move your plant somewhere else because we will never let you

(Testimony of John E. Martin)

work on them here''. And we had quite a bit of conv—of discussion. I asked Art at one time during the conversation if he was sure he was within his right in calling the boys off of the job and in stopping our use of Canadian shingles. And I said "Maybe, maybe you had better get some legal advice because if you don't let us run this car we intend to take you before the Labor Board." Art coyly said "Oh, that is all right, Martin". He said "If you want to go to court, just go ahead. I was talking to Mr. Hutchinson, the head of the carpenters, or the A. F. of L. Carpenters and Joiners in Indianapolis, Indiana, and he said they have a million and a half dollars fund there just to fight this sort of thing." And he said on several occasions [35] "Why don't you get a car of Canadian shingles in and make a test case of this?"

Mr. Flood: Now just a minute. I didn't quite get your answer. I did not quite understand that answer. Who said it?

The Witness: Mr. Brown told me that if I wanted to take it to court to go ahead because Mr. Hutchinson who, I presume, was the President of the American Federation of Labor, and he mentioned Mr. Hutchinson in Indianapolis said that he had a million and a half dollars in the fund to fight just such a case, and he said——

Trial Examiner Royster: Well, this is all what Brown had told you anyway?

The Witness: Yes. That is right.

Trial Examiner Royster: All right. Go ahead.

(Testimony of John E. Martin)

Q. (By Mr. Constantine): Will you continue?

A. And Art said Mr. Hutchinson had asked him on several occasions why he did not get a car of Canadian shingles in here to make a test case out of it.

Q. You said you presumed that Mr. Hutchinson was President of the American Federation of Labor?

A. Well, he did not mention that he was. But he mentioned Mr. Hutchinson of the Indianapolis office and I found out later. He did not say that Mr. Hutchinson was the President.

Q. Was there any other conversation or further talk? [36]

A. Yes. During the course of the conversation Mr. Brown stated that he had been trying to organize these Canadian mills, trying to get them to agree to the same wages and hours and working conditions that they have here and he specifically mentioned one, a mill operated by a fellow by the name of Meeker. I am not acquainted with the mill myself but that is what he said. It was just about ready to sign up with him because he had been having a lot of trouble selling his shakes in California.

Q. Who is Meeker?

A. Meeker. He has been having a lot of trouble selling his shakes in California due to the fact that it was a Canadian operation and that he wanted to sign up with this union and to go on a six-hour day and to pay the higher wage rate and meet the same conditions as we have here so that the union

(Testimony of John E. Martin)

would not oppose the sale of his shakes in California.

Q. This is what Mr. Brown told you?

A. This is what Mr. Brown was telling us, yes. I don't know Mr. Meeker myself.

Q. All right. Go ahead.

A. And then so, on three or four occasions during the conversation Mr. Brown reiterated the statements that he absolutely would never permit his union men to work on Canadian shingles in our plant. So, I said, finally I said, [37] "Well, Art, then for the record, you are calling the boys off the job here?" And Art Brown said, "No, let's just say that the boys refuse to work on Canadian shingles." And I turned to Mr. John A. Martin, the shop steward, and I said "How about that, Johnnie?" And John A. Martin turned to Art Brown and he said, "The reason that we refuse to work on Canadian shingles is because you ordered us not." And I turned to Mr. Brown and I said, "How about that, Art?" and Art said, "Well, O.K. For the record, let us have it that way. We absolutely won't allow your boys here to work on Canadian shingles." So we had a little more discussion and Art Brown, I think, Uttley and the two shop stewards left first, and Mr. Brown was on the way out and I said, "Well, listen, Art," I said, "you realize that you are in violation of your contract?" You called the boys off of the job here without following out the provisions provided for in the contract in the 'no-strike no-walkout' clause." He said, "No,

(Testimony of John E. Martin)

we have not violated any contract” and so forth; and we argued that point for a while and we looked up what the “no-strike no-walkout” clause was in the contract and he then went outside and Mr. Uttley had already gone outside. I took my flashlight; it was dark by that time, and I took my flashlight to show Mr. Brown the way to the car.

Q. Did you have any further conversation with Mr. Brown after this flashlight showing him to the car? [38]

A. Yes. I returned to the office and stood at the door waiting for him to pull out in the car and they did not pull out and there was, oh, it may have been about a minute or so, Mr. Brown finally said, “Say, Martin——

Q. How far away was he at this time?

A. Oh, about twenty feet; and I was standing right in the doorway of the office and the car was about twenty feet away. He said, “Say, Martin,” he said, “We decided that we will give you a letter on that if you want. We will write a letter tomorrow stating our position that we are refusing to allow the boys to work on Canadian shingles.” And I said, “Well, Art, it is a little bit late for that; you have called the boys off on Friday already and this is Monday night and we have been down a couple of days.” I said, “I think you are a little late in doing that and as far as I’m concerned you don’t have to give me any letter.” He said, “Well, will you be satisfied if I don’t give you a letter?”

“Well,” I said, “I’m not saying I’m not, I’m

(Testimony of John E. Martin)

not saying I'm satisfied. You don't have to write me a letter. I think it is too late to do that now." And he said, "O.K." And that is the last that I talked to Art Brown.

Q. Have your shake mills been open since January 11th, 1952?

A. No, it has been down continuously since that time.

Q. And what happened to the Canadian shingles which came [39] to the shake mill on January 11th, 1952.

A. Well, we left that car sit there. It sat on our siding from that time, January 11th until about February 1 or February 2, 1952, waiting to see if we could get it straightened up and get the boys to groove it, to process it.

Q. And what happened around February, 1952?

A. Well, in February of 1952 we moved the car to Chehalis and we sold the car.

Q. The shingles were never processed at your shake plant?

A. No, sir.

Q. All right.

I have no more questions, Mr. Examiner.

Trial Examiner Royster: Do you have any questions, Miss Krug?

Miss Krug: I have no questions, Mr. Examiner.

Cross Examination

Q. (By Mr. Flood): When was it that you first entered into the contract with the North Shore?

A. Around the early part of December, 1951.

(Testimony of John E. Martin)

Q. And that was an oral contract?

A. Yes, sir.

Q. Who was present representing the North Shore when the contract was entered into?

A. John L. Gerard.

Q. Who was present with you representing your Company? [40]

A. Frank Barker.

Q. And this contract was executed where?

A. We held the conference in, and entered into this agreement in Room 407 of the Camlin Hotel; I think it was Room 407 but it was at the Camlin Hotel anyway.

Q. How long had you known Mr. Gerard?

A. About three years.

Q. You had had other business dealings with him, had you not?

A. Yes, sir.

Q. That was in connection with the Perma plant in Chehalis?

A. Yes, sir.

Q. Of which you are manager?

A. I am manager of the West Coast division.

Q. That is officially known as the Perma Products Company?

A. Yes.

Q. And, Mr. Barker, your associate at the Sound Shingle is also an official of that company?

A. Yes.

Q. Of the Perma Company?

A. Yes.

Q. Does Mr. Barker likewise live in Chehalis, or where does he live?

A. He lives in Cleveland, Ohio. [41]

Q. Does he spend some time in Chehalis?

A. Yes.

(Testimony of John E. Martin)

Q. He has a residence, does he not, when he is in Chehalis? A. No.

Q. You do have a residence in Chehalis?

A. Yes.

Q. Now, by the terms of this oral agreement, do I understand that the Sound Shingle agreed to accept shipping of the North Shore Shingle, to groove them for North Shore and then to deliver them to North Shore's customers?

A. That is right, not to deliver them but to re-ship them.

Q. To reship them.

This carload that you received, who was the consignee in the carload?

A. The Sound Shingle Company.

Q. And what was to be your practice with regard to shipments after you had grooved these shingles? Were you the consignor or was the North Shore the consignor?

A. The North Shore Shingle Co. was the consignor. The North Shingle Company was the shipper. They were to be reshipped in the name of the North Shore Shingle Co.

Q. And this carload that you received was shipped to you to be grooved to cover what orders?

A. (No answer.) [42]

Q. Well, were they to be shipped to Oregon?

A. To Dant and Russell Company in New York.

Q. Now, by the terms—do you know that Company?

A. No, I had never had any dealings with that

(Testimony of John E. Martin)

Company, myself, and I am acquainted, I guess, with one of their representatives. I met him one time but I never had any dealings with them.

Q. But the Perma Company in Chehalis ships to Dant and Russell, do they?

A. No, never. We have never shipped a car to Dant and Russell, no.

Q. Now, what was the agreement with respect to your compensation for grooving those shingles?

A. Well, we were to get the difference between the market price——

Mr. Constantine: Wait a minute. I don't quite understand the nature of that question. They want to know how much he was going to get for grooving the shingles. I don't see how it is material to any issue.

Mr. Flood: Well, I think it is very material. I think we are entitled to know the entire contract. If part of it has been put in we are entitled to know the entire contract.

Mr. Constantine: He is entitled to know whether he was to be compensated or not but the amount of the compensation is not material to any issues here, your Honor. [43]

Trial Examiner Royster: I think you are right. I will sustain the objection.

Q. (By Mr. Flood): Now the first time that you ever told any representative of the union or Art Brown about that contract was that Sunday afternoon, wasn't it, January 13th?

A. I don't remember if I have ever told any-

(Testimony of John E. Martin)

body, any of the union officials anything about it prior to that time.

Q. May I ask you whether the Perma Company in Chehalis also purchases or processes shingles for North Shore? A. We purchase——

Mr. Constantine: Wait a minute. I don't quite see the relevancy of the Perma Products Co. in connection with the Sound Shingle, your Honor.

Mr. Flood: In keeping with the distinguished tradition which counsel himself has established we'll connect it up.

Trial Examiner Royster: Quickly? Or eventually?

Mr. Flood: Well, as quickly as I can in my rather clumsy way.

Trial Examiner Royster: All right.

Mr. Constantine: May I have a standing objection to this pursuant to your instructions?

Trial Examiner Royster: Yes, subject to a motion to strike.

Mr. Constantine: On everything pertaining to Perma Products Company. [44]

Trial Examiner Royster: All right. Go ahead.

Q. (By Mr. Flood): That is correct, is it not?

A. What was the question again?

Q. That the Perma Company in Chehalis has processed shingles received from North Shore?

A. Yes, we have but not on a custom grooving basis; on an outright purchase.

Q. Now then, these shingles that you purchased from North Shore, these shingles that you agreed

(Testimony of John E. Martin)

to process for North Shore that were shipped in on January 11th, 1952, in this Great Northern car, did they have what is known as a certigrade label attached thereto?

A. I don't know because I never saw the shingles myself.

Q. Are you familiar with the operation of the shingle mill and the shake plant at Marysville, Washington? A. Yes, sir.

Q. It is a fact, is it not, that you use the union label on each and every bundle of shingles or shakes that you manufacture up there up to January 11th?

A. I could not swear that we did put it on every bundle but it was my understanding that the union insisted that any shingles processed or manufactured there carried the union label.

Q. And you attempted to conform to the union label requirement that every bundle carry the union label? [45]

A. Well, we did not conform. It was my understanding that this union label business was carried out solely by the members of the local union on instructions from the union. At one time, to go a little further on that, at one time I raised the question with Jack Butters.

Q. Well, that is not responsive.

Trial Examiner Royster: All right. Just confine yourself to the question.

Q. (By Mr. Flood): So that the shingles that you received from North Shore in this particular shipment would have, if the manufacturing process

(Testimony of John E. Martin)

of grooving had been completed, would have necessarily borne the union label, would they not?

Mr. Constantine: I object, your Honor.

Trial Examiner Royster: It certainly is contrary to the testimony so far. I will sustain the objection.

Perhaps I should say it finds no support in the testimony to this point.

Q. (By Mr. Flood): I understand you, do I not, to say that the union insisted that any shingle that they manufactured bear the union label? You have just told me that, haven't you?

A. I just said that was my understanding but I also said I could not swear to the fact that it was on all of them because I was not there at the plant all of the time.

Q. Prior to this carload shipment have you ever processed [46] grooved any other shingles for any other company other than your own?

A. Well, do you mean——

Q. (Interposing) On the processing service basis, such as you, such as your contract here?

A. To custom groove them?

Q. Yes. A. No.

Q. Well, now, as a matter of fact, you know, do you not, that any shingle that was grooved by the union would have to have the union label otherwise the union would not work on it? You knew that, did you not?

Mr. Constantine: I object to that, Mr. Examiner.

(Testimony of John E. Martin)

Trial Examiner Royster: Let him answer. I will overrule the objection.

Mr. Flood: Mr. Constantine, may I ask whether you could produce for, from your files the copy of the union label agreement that we furnished you.

Mr. Constantine: Yes, I will be glad to.

Q. (By Mr. Flood): Mr. Butters was your superintendent? A. At that time, yes.

Mr. Flood: I think I furnished you with a photostat of that, did I not?

Mr. Constantine: No, I have a copy of it.

Mr. Flood: I wish to have the official reporter please [47] mark this for identification as Respondents' Exhibit No. 1.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Flood): Showing you Respondent's Exhibit No. 1 for identification, is that not a copy of the agreement that you entered into with the union with respect to your union label, with respect to their union label? A. No, sir.

Q. Do you have a copy of the agreement?

A. No, sir. We never signed any. The only man authorized to sign agreements at our plant is Mr. Ralph Stuck.

Mr. Flood: I move that that be stricken as volunteered and not responsive.

Trial Examiner Royster: All right. "The only man authorized" and so forth may be stricken.

(Testimony of John E. Martin)

Mr. Flood: I still will connect this up by a later witness.

Mr. Flood: And on your objection as to the identification, I will locate the original.

Mr. Constantine: I don't object to the identification. I am objecting to any offer of it, your Honor.

Trial Examiner Royster: Well, it has not been offered.

Q. (By Mr. Flood): You say you knew Mr. Sarrett? [48] A. Yes, sir.

Q. You had known him for how long?

A. Oh, possibly a year or so prior to this incident.

Q. And was it December, 1950, about—when was it you had your conversation with Mr. Sarrett in Chehalis?

A. With reference to this particular case about the latter part of January. It could have been the early part of February but it was about that time; just shortly after we acquired the Sound Shingle Company.

Q. That was 1951? A. Yes.

Q. You had known Mr. Sarrett prior to that time, hadn't you?

A. Yes. I'd say about a year or so before that.

Q. And when he talked to you at Chehalis in January, 1951, you had not yet purchased the Sound Shingle at Marysville?

A. Yes, we had. Mr. Barker and I had purchased the assets and then we had formed a corporation

(Testimony of John E. Martin)

with he and I as the sole stockholders with the exception of one share to the attorney that was handling the deal as one of the incorporators.

Q. This conversation took place at your office, at the manager's office of Perma Products Company in Chehalis, did it not?

A. That is right.

Q. Did you say there was quite a bit of other conversation [49] besides what you told us about?

A. Yes.

Q. That had to do with the settlement of a dispute between your company in Chehalis and the union over the illegal use of the union label on shipments to California, did it not?

A. No, sir.

Mr. Constantine: I object to the question, your Honor.

Trial Examiner Royster: I will sustain the objection. The answer may go out.

Mr. Flood: For the record, your Honor. I have several further questions that I will agree that the witness may pause until counsel makes his objections that I am confident he will make.

Trial Examiner Royster: Go ahead.

Q. (By Mr. Flood): That was the time when you were settling your litigation with the union over the illegal use of the union label, was it not?

Mr. Constantine: I object, but first it may be, there is no ground for my objection but I want to know what you mean by "you." Does he mean Perma Products Company or does he mean Sound Shingle?

(Testimony of John E. Martin)

Trial Examiner Royster: When you say "you" were settling, do you mean Perma Products or Sound Shingle?

Mr. Flood: As far as I am concerned I am talking about [50] this gentleman, whatever his function may have been.

The Witness: I never had anything to do with it.

Mr. Constantine: Well, if he is going to go on a fishing expedition I am going to object, your Honor. I want to know what he is talking about. Is he talking about Sound Shingle or Perma Products?

Trial Examiner Royster: And you say you are just talking about what this man was doing? Well, I will sustain the objection. I think Brother Uttley could not have referred to Sound Shingle at that time, it not having begun operations.

Mr. Flood: This is preliminary, your Honor, for an offer of proof.

Trial Examiner Royster: All right.

Q. (By Mr. Flood): Who is Mr. I. E. Phillips, Mr. Martin?

A. He is President of the Perma Products Company.

Q. Do you know him? A. Yes.

Q. Are you familiar with the litigation in the United States District Court for the Southern Division, in Tacoma, Washington, between the Washington-Oregon Shingle Weavers' District Council and Perma Products Company with respect to

(Testimony of John E. Martin)

Perma Products Company's use of the union label?

Mr. Constantine: I object.

Trial Examiner Royster: Sustained.

Q. (By Mr. Flood): Are you familiar with the facts—[51] pause for objection—are you familiar with the fact that the Perma Products Company drew a stipulation, executed by their attorneys, and Mr. I. E. Phillips entered into stipulation of dismissal of the litigation on January 2, 1951?

Mr. Constantine: I object to that and may I have a standing objection, Mr. Examiner?

Trial Examiner Royster: Yes. All right. I will sustain the objection.

Mr. Flood: This is in connection with my offer of proof.

Mr. Flood: I ask the reporter to please mark this as Respondent's Exhibit No. 2 for identification.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

Trial Examiner Royster: All right. Let's take a five-minute recess.

(Short recess.)

Trial Examiner Royster: The hearing will please come to order.

Mr. Flood: Mr. Examiner, it has just occurred to me, I wonder if I am incorrect about this but I don't recall that the witness was sworn, was he?

Trial Examiner Royster: He was.

(Testimony of John E. Martin)

Mr. Flood: Thank you. Then, I just wanted to be sure [52] of that.

Q. (By Mr. Flood): Bear in mind, Mr. Martin, that you are entitled to pause until your counsel objects to my next question because I am still on the same subject and I am not seeking to defy the court rules; I am merely seeking to make a record preparatory to an offer of proof.

How long have you been manager of the Perma Products Company in Chehalis?

Trial Examiner Royster: Are you objecting to this also?

Mr. Constantine: Yes.

Trial Examiner Royster: I think you had better interpose your objections as the questions are asked.

Mr. Constantine: All right. I will object to it.

Trial Examiner Royster: The objection is sustained.

Q. (By Mr. Flood): You were manager during the year 1950 and 1951?

Mr. Constantine: I will object.

Trial Examiner Royster: The objection is sustained. Could you make a narrative offer of proof of all of this Mr. Flood?

Mr. Flood: Yes, I perhaps could, yes.

Trial Examiner Royster: All right, go ahead.

Mr. Flood: I have just one more item.

Trial Examiner Royster: All right, go ahead.

Q. (By Mr. Flood): At this time I will ask

(Testimony of John E. Martin)

the official [53] reporter to please mark this document as Respondent's Exhibit 3.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 3 for identification.)

Q. (By Mr. Flood): I am showing you, am I not, a part of a carton in which the shakes from the Shakertown Sidewall Shakes are shipped as manufactured by the Perma Products Company in Chehalis?

Mr. Constantine: Now, wait a minute; is that something that has been identified?

Trial Examiner Royster: He is trying to get it identified now.

Mr. Constantine: Well, is it offered?

Mr. Flood: I am trying to identify it a little further.

Mr. Constantine: Well, the thing speaks for itself, Mr. Examiner. I want to know if he is going to examine the witness on it because if he is I want to object.

Mr. Flood: I certainly am entitled to ask this witness if he knows whether this portion of the carton is a carton in which the Perma Products Company ship their stained shakes from their plant in Chehalis.

Trial Examiner Royster: All right, now that is the question to the witness?

Mr. Flood: That is the question. [54]

Mr. Constantine: I object.

(Testimony of John E. Martin)

Trial Examiner Royster: All right. The objection is sustained.

Q. (By Mr. Flood): I have one further question. No, I will withdraw the question.

Now, then, the offer of proof is this, your Honor, that Mr. Martin for a number of years, the exact number of years I don't know but I do know that it included 1949 and 1950 and 1951 and up to the present is manager of the Perma Products plant in Chehalis, Washington. It is a plant which stains shingles. It operates non-union. It has no contract with the respondent union here, the Washington-Oregon Shingle Weavers' District Council. It did, however, purchase shingles from a shingle manufacturer in Seattle, M. R. Smith, to which were attached the respondent union's labels and after having stained them in his plant that operates unfair to the respondent union, after having stained them in Chehalis, shipped them in interstate commerce and particularly to Sacramento, California, in carload lots with the carpenters' label attached thereto. That when that was discovered it was called to Mr. Martin's attention by Mr. Sarrett. The company disclaimed any contact with that territory and denied that they were engaged in that practice but when Mr. Sarrett finally furnished the proof and brought this carton and the union label attached thereto to Mr. Martin's attention, litigation [55] which was then pending was immediately settled on the stipulation that the company

(Testimony of John E. Martin)

would cease and desist from using the union label thereafter.

Trial Examiner Royster: Does that conclude your offer of proof?

Mr. Flood: Yes.

Mr. Constantine: I move to reject the offer of proof.

Trial Examiner Royster: The offer of proof is rejected.

Q. (By Mr. Flood): This carload of shingles that you received in, from North Shore January 11th remained on the spur there for ten days or a couple of weeks and then you shipped it to the Perma Products Company in Chehalis, Washington? Did you not? A. I believe so.

Q. Is Mr. John L. Gerrard one of the owners of the North Shore Company? A. Yes.

Q. Are there others?

A. Well, it is a corporation. I imagine—I don't know for sure who the owners are. I do not have the least idea who the other stockholders are, if there are any, but I presume there are.

Q. Now, I understood you to say that at this meeting Monday afternoon, January 14th, at 4:00 o'clock p.m., a Mr. Conrad and a Mr. Martin were there. Mr. Conrad as shop [56] steward of the shingle mill and Mr. Martin as shop steward of the shake plant. A. Yes, sir.

Q. And you have not seen him before? You did not know him before?

A. I did not know him before, no.

(Testimony of John E. Martin)

Q. In your testimony on direct examination I understood you to say that after discussing the matter with Mr. Brown that Mr. Brown said that these men merely refused to work on Canadian shingles and you then turned to Mr. Martin and you said, "Johnnie, how about it?" A. That is right.

Q. So that the first time that you met Mr. Martin you addressed him as Johnnie?

A. Everybody calls him Johnnie there in the company.

Q. You did not know that before, you did not know Johnnie before.

A. Yes, I had heard Ralph mention his name quite a number of times to me when I was up there but I had never met him that I remember of.

Q. Now, when you called Mr. Brown, that was on a Friday afternoon or on a Friday evening on January 11th? A. Right.

Q. And you told Mr. Brown that the men had walked off of the job, did you not? A. Right.

Q. And Mr. Brown told you that he was attending a convention and would come down and talk to you about it at the conclusion of the convention on Sunday or Monday?

A. No. That is not, that is not right; not at that time.

Q. What did he tell you?

A. He told me that we could not run Canadian shingles.

Q. You were calling from Chehalis, were you not? A. Yes, sir.

(Testimony of John E. Martin)

Q. From your home or from the office of the Perma Stain Company? A. From my home.

Q. At that time, how many shifts were you operating in the shake plant?

A. Well, we had been operating three shifts up until the time that we ran short of shingles.

Q. When did you close down the shingle mill?

A. (No response.)

Q. Or when did you lay off the men in the shingle mill?

A. In, I believe, about the 1st of November.

Q. You had at that time an inventory of cedar on hand with which to manufacture shingles, did you not?

Mr. Constantine: Mr. Examiner, does it make any difference whether he had an inventory or not? I do not see the materiality of it. [58]

Trial Examiner Royster: I don't know.

Mr. Flood: Well, for what it may be worth, I have in mind Article VI of the contract which is not in evidence as yet and perhaps I should put it in.

I will ask the official reporter to please mark this document as Respondent's Exhibit No. 4.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Q. (By Mr. Flood): Does the Sound Shingle Company participate in the Joint Industrial Relations Board?

A. Yes, we have.

(Testimony of John E. Martin)

Q. And up to the present time you do? You have not withdrawn from it? A. No.

Q. The collective bargaining contract that you spoke about on direct examination is the contract that I show you marked as Respondent's Exhibit No. 4, is it not? A. Yes.

Mr. Flood: I will offer it in evidence.

Mr. Constantine: The whole contract? How much do you offer, Mr. Flood?

Mr. Flood: Just a minute. Let me have the advice of my counsel here.

Mr. Ward: The whole contract. [59]

Mr. Flood: The whole contract.

Mr. Constantine: All right.

Trial Examiner Royster: Without objection respondent's Exhibit is received in evidence.

(The document heretofore marked Respondent's Exhibit No. 4 for identification, was received in evidence.)

[See pages 39-62 of this printed Record.]

The Witness: May I see it? Was that the one that we signed? Is that the contract that we signed?

Mr. Flood: As far as I know it is.

That will be all the testimony.

Mr. Constantine: I did not object on the ground that I thought it was a signed contract. I have one that he can put in if he wants to, Mr. Examiner. I would rather have the original go in.

Trial Examiner Royster: Well, if there is agreement, and it appears there is.

(Testimony of John E. Martin)

Mr. Flood: It is an exact copy of the signed contract.

Mr. Constantine: But the signatures are important to me also.

Mr. Flood: I will ask you to produce the original.

Mr. Constantine: May I offer this in its place, Mr. Flood?

Mr. Flood: Yes, sir.

Trial Examiner Royster: It is received in evidence. [60] Respondent's Exhibit No. 4 is in evidence and there has been a substitution but Respondent's Exhibit No. 4 is in.

Mr. Constantine: Thank you.

Q. (By Mr. Flood): Mr. Ralph Stuck was your business, is your business manager and has been your business manager at Marysville?

A. Yes, sir.

Mr. Flood: A problem will arise in this case, Mr. Examiner, with respect to the significance of Article VI and it is in connection with that Article that I will ask my question, my last question.

Trial Examiner Royster: All right.

Mr. Flood: Which, I think, will make my last question material.

Will the official reporter please read my last question?

(The question was read as follows):

“Q. You had at that time an inventory of cedar on hand with which to manufacture shingles, did you not?”

(Testimony of John E. Martin)

Trial Examiner Royster: Now, this is in connection with the closing of the shingle mill that was testified to in November of 1951?

Mr. Flood: Yes. That contract embraces both the shingle mill and the shake plant and it covered an operating unit.

Trial Examiner Royster: Well, now, is it the position of [61] the union that the employer here violated the contract and that the labor dispute stems from such violation?

Mr. Flood: Well, previously, briefly, it is the position of the union, among other considerations, that that article in the contract protects the union against working on non-labeled products.

Mr. Constantine: By that article, I assume, to make the record clear, Mr. Examiner, that Mr. Flood is referring to Article VI of the Collective Bargaining Contract?

Trial Examiner Royster: Yes, which is in evidence as Respondent's Exhibit No. 4.

Mr. Flood: And specifically Paragraph (c).

Trial Examiner Royster: Well, I can understand a defense based on that, Mr. Flood, but I don't see the connection between such a defense to the alleged conduct of the union and its members in January, 1952, relating back to the closing of the shingle mill in November, 1951; that is where my confusion arises.

Mr. Flood: All right, to pin-point it I will ask the witness this question.

Q. (By Mr. Flood): You had on January 11th,

(Testimony of John E. Martin)

1952, a very considerable inventory of cedar on hand, did you not?

Mr. Constantine: I will object.

Trial Examiner Royster: I will overrule the objection.

The Witness: What do you mean by cedar, please? [62]

Q. (By Mr. Flood): Well, probably you know more about cedar than I do.

Trial Examiner Royster: Well, you don't understand the question?

The Witness: No, I don't know just what he is referring to.

Q. (By Mr. Flood): You are not able to tell the court or me what cedar means?

A. Well, I don't know who I am to tell you what it means.

Trial Examiner Royster: Well, you have something in mind in asking the question, Mr. Flood. Now please advise the witness.

Mr. Flood: Well, I am not too concerned about it because I am going to put in proof by the witnesses although frankly I thought he would be, he would be frank enough to admit it.

Mr. Constantine: I don't think that this is the time for counsel to characterize the conduct of the witness, Mr. Examiner.

Trial Examiner Royster: All right, it will be ignored.

Q. (By Mr. Flood): Did you on January 11th,

(Testimony of John E. Martin)

1952, have any stock on hand out of which shingles or shakes could be made or grooved?

Mr. Constantine: I object.

Trial Examiner Royster: Overruled. [63]

The Witness: We did not have any stock on hand out of which we could process shakes.

Q. (By Mr. Flood): The stock that you had on hand was stock out of which you would have manufactured shingles?

A. I don't recall whether we had any. You are referring to logs now, I guess, are you? That is what you make shingles out of.

Q. Well, you told me you did not know what cedar meant.

A. You cut shingles out of logs.

Q. You told me you did not know what cedar meant so I made it more general and called it stock.

Mr. Constantine: Mr. Examiner, I submit there is no question for the witness.

Trial Examiner Royster: Perhaps there is not; I don't know.

Mr. Flood: Will the reporter please read my last question. It is true that it is leading, but I have a right to lead on cross examination.

(The question was read as follows:

“Q. The stock that you had on hand was stock out of which you would have manufactured shingles?” “A. I don't recall.”)

Q. (By Mr. Flood): Is there anything about that that would render it difficult for you with your business experience to answer? [64]

(Testimony of John E. Martin)

Trial Examiner Royster: He answered, he said he did not recall.

Q. (By Mr. Flood): Oh, that is your answer that you don't recall?

A. That would be logs; you make shingles out of logs. I was not trying to be funny. I just did not know whether you meant shingles or whether you meant logs when you said cedar, Mr. Flood. That was the thing. Now, if you say logs, I don't know if we had logs on hand at that time. I knew we did have shingles but these shingles were green and we could not dry them and you have to have good dry shingles before you can use them for shakes. Now, that is the situation.

Q. (By Mr. Flood): You say that you had done business with Hunting-Merritt in Canada?

Mr. Constantine: I don't like to interrupt and I am not doing so to be impolite but if Mr. Flood has finished with that line of questioning I should like to make a motion to strike, Mr. Examiner, please.

Trial Examiner Royster: Well, I will deny the motion to strike. I am not entirely clear in my own mind as to the meaning of Article VI.

The Witness: What was the question?

Q. (By Mr. Flood): You say that you had done business with Hunting-Merritt and not as Sound Shingle Company.

A. I had never done business with Hunting-Merritt as the [65] Sound Shingle Company. I know them.

(Testimony of John E. Martin)

Q. You have done business with them as a representative of Perma Products Company?

A. Yes.

Q. Now, as a matter of fact, when Mr. Sarrett called on you he told you, did he not, that Canadian shingles were unfair because they did not bear the union label and that his concern was union label?

A. No. Nobody ever mentioned any union label to us at all.

Mr. Flood: Will your Honor pardon me for just a moment?

Trial Examiner Royster: Surely.

Mr. Flood: Is Mr. Stuck here in the courtroom?

Mr. Stuck: Yes.

Q. (By Mr. Flood): He was present at the time of that conversation, was he not?

A. Which conversation are you referring to? Are you referring to Sunday afternoon?

Q. Yes. A. Yes, he was there.

Q. Now, are you going to call Mr. Stuck as a witness?

Mr. Constantine: I don't know, Mr. Flood. I may.

Mr. Flood: Well, he is in the courtroom and I will ask him to be instructed to remain because I am not sure [66] whether——

Trial Examiner Royster: Well, I will give you a subpoena for him if you want it.

Mr. Flood: If counsel is unwilling to assure me that he will remain I will ask for a subpoena.

Trial Examiner Royster: Why don't you just

(Testimony of John E. Martin)

ask Mr. Stuck if he will be available to you. He is right here in the courtroom.

Mr. Flood: Where is Mr. Stuck?

Mr. Stuck: Right here.

Mr. Flood: Will you remain, Mr. Stuck, for this hearing?

Mr. Stuck: Yes.

Q. (By Mr Flood): You do not live in Marysville at all, do you? A. No.

Q. You live in Chehalis? A. Yes, sir.

Q. And you just take occasional trips to Marysville? A. Yes, sir.

Q. You spend the most of your time in the Perma operation in Chehalis, do you not?

A. Yes, sir.

Q. The operation of the Sound Shingle plant at Marysville you leave to your superintendent?

A. No, to Ralph Stuck.

Q. Mr. Ralph Stuck? A. Yes.

Q. You usually don't concern yourself with the operational details at all, do you, with the operational details? A. Well, now——

Q. The words "at all"?

A. Yes, yes, I do. I am not there very often but I certainly watch it.

Q. That is largely by watching the profit and loss account?

A. Well, we get reports every day, surely, but the actual business management, the business end, is in the hands of Mr. Ralph Stuck and it always has been.

(Testimony of John E. Martin)

Q. Do you know it to be a fact, don't you, that some time after January 11th, 1952, a week or so after that, you opened the shingle mill again?

A. Yes.

Q. And it continued to operate for a couple of months; how long?

A. No, I don't think so. We started up about the last week in January. We operated during in February and we closed the shingle mill down about March 18, 1952, on or about.

Q. During that time the mill was staffed with Shingle Weaver personnel from the local union, the respondent union?

A. That is right.

Q. They never declined to work for you in the shingle mill?

A. No.

Q. Your shingle products, however, were manufactured out of local stock?

A. Oh, I do not know what you mean by local stock. They were the logs that you are referring to again. You manufacture shingles out of logs.

Q. All right. I want to avoid the technicalities.

A. Well, it is hard telling where they come from. There is a lot of shingle mills get logs from Canada and run CIO Canadian logs into shingles, lots of them do.

Q. I am talking about your shingle mill and your shingle operation.

A. Well, I don't know——

Q. In other words, that operation from January until you closed down in March, when, March 18th?

(Testimony of John E. Martin)

A. Approximately, on or about that time.

Q. That operation was just the same as the operation had been from the time you opened the mill?

A. Yes, that is right.

Q. And as long as you operated on your own shingle mill you had no difficulty with the union over the grooving plant, did you?

A. Just threats. [69]

Mr. Constantine: I did not hear the answer.

The Witness: Just threats; no actual trouble.

Q. (By Mr. Flood): Those threats were what?

A. Well, one of them was to the effect that if we continued this case, they would take the union's label away from us in the shingle mills and that would mean that the boys would walk out of the shingle mill too.

Q. Well, that is subsequent to this litigation?

A. Yes, that is right.

Q. That was during the operation from January to March 18th, 1952.

A. Well, some time after we, I don't know whether that threat was made, whether that was made before we resumed the operation in the shingle mill or not. I think it was after that time.

Q. It is a fact, however, that they have never withdrawn the union label?

A. No.

Q. And during the operation from January to March 18th they used the label in exactly the same way as they used it before without any interference from the union?

A. Well, I presume so. I was not there.

(Testimony of John E. Martin)

Q. That is your best knowledge?

A. I presume so. We did not have any trouble as I stated in the first place. [70]

Q. There never was any picket line around there at all, was there? A. No.

Q. Now, several of the men, how many employees are there in the shake plant?

A. I believe about nine.

Q. And about four of them at least have continued to work for you since, have they not?

A. Not in the shake plant. We put them to work in other places.

Q. Well, you have not been operating the shake plant?

A. No; we put them at various jobs.

Q. So you continued them at work in other jobs?

A. That is right.

Q. And some of them even worked in the shingle mill while you were operating the shingle mill, did they not?

A. Not that I know of; none of the shake plant's boys worked in the shingle mill that I know of.

Q. Well, you say that Mr. John A. Martin did not work in the shingle mill.

A. No, not that I know of.

Q. If he did you do not know of it?

A. Well, no, I don't know of it if he did.

Q. Of course you are not there often enough to know who worked every day or not, are you? [71]

A. Of course, that would not make any difference. It would not make any difference to me.

(Testimony of John E. Martin)

Q. It would not make any difference. He was perfectly entitled to work.

A. Yes. I don't know whether he did or not. I had no trouble with the boys at all.

Q. The Sound Shingle Company is not a partnership; it is a corporation?

A. The Sound Shingle Company is a partnership.

Q. I had understood you to say it was a corporation.

A. I said we had started it; we bought it in January and formed a corporation and then my opening testimony was that beginning in April it was operated as a partnership. We dissolved the corporation March 31st.

Mr. Flood: I have no further questions.

Re-direct Examination

Q. (By Mr. Constantine): I would like to have one matter cleared up. Mr. Martin, in response to a question from Mr. Flood, you stated that there was no trouble with the, in the grooving plant between January and March 18th.

A. That's right, no trouble with the boys.

Q. Between January and March?

A. We did not work. We did not work in the grooving plant during that period.

Q. And was there some reason why the grooving plant did [72] not work?

A. Well, the boys——

(Testimony of John E. Martin)

Mr. Flood: That is immaterial. The testimony is, "They did not work."

Trial Examiner Royster: The objection is overruled. You may answer.

The Witness: From January 11th until February 1st we tried to induce the boys to go back to work because we had this car of Canadian shingles that we wanted to process. We did not have any orders for any shakes direct to direct customers of our own, and we have not had since that time. The only orders that we have had are these orders to custom groove for North Shore Shingle Company and that is the boys refused to work on the Canadian shingles and that is why we have been down from that time until now.

Q. That is to say that when you make shingles in your own plant you can also groove those shingles if you have orders from someone who wants shakes?

A. Or if they are dry enough but in our particular case even if we would have wanted to have dried them we could not get them dried right. Our kilns were not working. We could not get the steam up so they were not suitable for grooving even had we had an order for them.

Q. That is order from your own customers?

A. From direct customers, yes. [73]

Q. But the arrangement with North Shore was a different arrangement, that is, you grooved their shingles and not your own.

A. Well, that was the general set-up for their

(Testimony of John E. Martin)

customers. They had the customers. We did not have them.

Q. The shingles came to you from North Shore?

A. From North Shore.

Q. The contract did not provide that you make the shingles and then groove them?

A. No, oh no.

Q. All right.

Mr. Constantine: That is all.

Trial Examiner Royster: Is there anything further?

Cross-Examination

Q. (By Miss Krug): Mr. Martin, do you know who ordinarily put the union label on the shakes that were manufactured by Sound Shingle Company?

A. Well, I never personally saw a label applied.

Trial Examiner Royster: Well, if you do not know I think that that is your answer.

Q. (By Miss Krug): Did you ever instruct anyone to apply it? A. Never.

Q. Did you ever forbid anyone to apply it?

A. Never.

Q. Did you ever give any instructions with reference to [74] the use of the union label in the Sound Shingle Company?

A. Well, the only reference, the only discussion that I ever had I had with Mr. Jack Butters, our superintendent, and it seemed foolish to me——

(Testimony of John E. Martin)

Q. Well, that is not quite responsive. Did you ever give any instructions?

A. No, never, in no way, shape or form.

Miss Krug: That is all the questions that I have. I have no further questions.

Mr. Flood: I have a question or two, if you please.

Re-cross Examination

Q. (By Mr. Flood): What you agreed to do for North Shore then was just to render the service of grooving the North Shore shingles? That is what it comes to, is it not?

A. Yes, that is what it amounts to.

Q. That is what you call custom-grooving?

A. Well, yes. It is practically a custom-grooving operation.

Q. Now in your conversations with Art Brown Sunday afternoon or Monday afternoon you asked Art Brown, you say, as I understood you to say, whether you could import shingles from Hunting-Merritt?

Miss Krug: I believe that is improper cross, re-cross examination. I believe.

Trial Examiner Royster: I will overrule the objection. [75]

The Witness: Now what was your question again, Mr. Flood?

Q. (By Mr. Flood): You asked Art Brown about handling or processing shingles made by

(Testimony of John E. Martin)

Hunting-Merritt which you told Mr. Brown was an A. F. of L. operation in Canada?

A. Yes.

Q. And you say you mentioned them because you had done business with them before?

A. Well, not as Sound Shingle Company, as I stated before.

Q. Was that custom-grooving or was that, that outright purchasing?

A. It was not mentioned; I don't believe at that particular time with Mr. Art Brown there was not any mention made of whether or not it was with reference to Hunting-Merritt as to whether or not it would be custom-grooving or an outright purchase. In fact it would not be custom-grooving with Hunting-Merritt.

Q. Are you familiar with the North Shore operation?

A. Do you mean with their mill?

Q. Yes.

A. Yes.

Q. They have a shake plant just the same as you have in Marysville?

A. Yes.

Q. Do they have a staining plant as well? [76]

A. No.

Q. They have a shingle mill and a shake plant just as you have?

A. That is right.

Mr. Flood: That is all.

Re-direct Examination

Q. (By Mr. Constantine): On your custom grooving and on your shake processing, that is all done in the shake plant, is that right?

(Testimony of John E. Martin)

A. That is right. ,

Q. The shingle mill does not do any of that work?

A. No. It has nothing to do with it.

Mr. Constantine: All right, I guess that is all.

Trial Examiner Royster: That seems to be all then, Mr. Martin.

Mr. Flood: Just a minute.

Trial Examiner Royster: He is not going to run away. If you want to question——

Mr. Flood: Yes, I have a question.

Re-cross Examination

Q. (By Mr. Flood): For what other companies other than North Shore had you done custom-grooving?

Mr. Constantine: I object.

Trial Examiner Royster: The objection is sustained.

Mr. Flood: That is all [77]

Trial Examiner Royster: The witness is excused.

(Witness excused.)

Mr. Constantine: I will call Mr. Ralph Stuck.

RALPH STUCK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Will you please state your name? A. Ralph Stuck.

(Testimony of Ralph Stuck.)

Q. And your address?

A. Route 1, Marysville, Washington.

Q. And your occupation?

A. Office Manager of the Sound Shingle Company.

Q. That is located in Marysville?

A. Marysville, Washington.

Q. And what are your duties as office manager?

A. I am in charge of the office, handling the payroll, doing the book-keeping, keeping the books and billing the shingles out from the orders and in general, office manager.

Q. And part of your duties, you say, include keeping the books of the company?

A. Yes, sir.

Q. You personally keep them or do you supervise their keeping? [78]

A. I do them personally.

Q. And have you taken figures from the books of the company with respect to purchasers and sales.

A. I have.

Q. Do you have those here? A. Yes.

Q. All right. For the year 1951, and that would include the purchases and sales of the corporation prior to April 1st, what were the purchases of Sound Shingle Company? A. \$280,361.55.

Q. And how much of that was by the corporation and how much was by the partnership?

A. By the corporation \$102,442.11.

Q. And the rest was by the partnership.

A. Yes.

(Testimony of Ralph Stuck.)

Q. Do you know if any of the materials that you have just talked about came from out of the State of Washington?

A. They were supplied by local purchasers but the materials could have come like band irons and such could have come from out of the State and I believe they did.

Q. But you do not know what percentage of them came from out of the State?

A. No, I do not.

Q. All right now. During the year 1951, what were the sales for Sound Shingle Company including the corporation and [79] the partnership?

A. \$477,973.39.

Q. And what part of that was the corporation's sales? A. \$133,281.54.

Q. And the rest was the partnership?

A. That is right.

Q. And what, in dollars and cents, part of that was made to purchasers outside the State of Washington?

A. For the total operation, \$42,534.84.

Q. That is both the corporation and the partnership? A. Yes.

Q. And what part of that \$42,534.84 represents the partnership's sales to customers outside of the State of Washington? A. \$40,869.84.

Q. And those were shipped directly out of the State? A. That is right.

Q. You had charge of the shipments yourself?

A. That is right.

(Testimony of Ralph Stuck.)

Q. And those were to various customers in the United States outside the State of Washington?

A. That is right.

Q. All right. Now, as office manager you do come in contact with the employees and other people in the plant?

A. Yes, sir. [80]

Q. And you know John A. Barker?

A. That is right.

Q. Is he a member of respondent local 2580?

A. I don't know that he is but he would have to be if he was working there.

Q. Well, do you know if he holds any position?

A. Well, he is the shop steward.

Q. Of the local?

A. Of the local in our plant, in our shake plant.

Q. Do you have a shop steward in your shingle plant?

A. Yes, we do.

Q. What is his name?

A. Bill Conrad.

Q. And do you know Arthur Brown?

A. I do.

Q. Do you know if he holds any position in any of the unions?

A. He is the president of the District Council.

Q. Do you know Mr. Glenn Uttley?

A. I do.

Q. Do you know if he holds any position in the union?

A. My understanding is that he is the president of the Everett local and he is a vice-president of the District Council.

Q. And he is the man with whom you signed

(Testimony of Ralph Stuck.)

the collective [81] bargaining contract which is in evidence as respondent's Exhibit No. 4? He signed on behalf of local 2580?

A. That is right.

Q. Do you know Mr. Sarrett?

A. I have met him once.

Q. That was at the conferences.

A. That is right.

Q. Was he introduced or did he introduce himself at that conference?

A. He was introduced to me by Mr. Martin.

Q. As what?

A. Well, as the representative of the District Council.

Q. Do you know Mr. Fred Baker?

A. I do.

Q. And do you know if he holds any position in any of these unions?

A. He is a member of the District Council, I think. Yes, he represents the Oregon district.

Q. All right; now, from time to time have you noted whether either of your shop stewards or both of them distributed any literature on behalf of the union in your shake or shingle mill?

A. That is right, they have.

Q. Over a period of how many years?

A. Well, I was first employed in that mill in January, 1948 [82] and periodically every month or so since that time.

Q. And you have seen them distribute them since the partnership has taken over?

(Testimony of Ralph Stuck.)

A. That is right. They have brought them to the mill.

Mr. Constantine: I would like to have the official reporter mark this as General Counsel's Exhibit No. 2.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Mr. Flood: Are you offering the entire thing?

Mr. Constantine: I have not offered it yet. I am going to examine the witness on it.

Q. (By Mr. Constantine): Now, I would like to show you General Counsel's Exhibit No. 2, which has been marked for identification and ask you if you have seen either Mr. Martin or Mr. Conrad or both of them distribute that and similar publications in your shingle mill or in your shake mill.

A. That is right.

Q. You have? A. I have.

Q. Now this is entitled "The Shingle Weaver"; that is what I am referring to?

A. Yes, that is right.

Q. I see.

All right, I will offer General Counsel's Exhibit No. 2 [83] your Honor, in evidence.

Mr. Ward: For what purpose? I am going to object to it unless there is an explanation of it.

Trial Examiner Royster: Are you offering everything that is printed in there?

Mr. Constantine: I have to offer everything, your Honor, to show that it is a publication of the

(Testimony of Ralph Stuck.)

respondent District Council, but so far as the merits of the case are concerned I am offering only an item entitled "Convention Report" by O. M. Sarrett, but I need the rest of it in to show that it is the publication of the respondent District Council and especially I want page 2 in because of the fact that that is the page which identifies it as their publication.

Mr. Ward: What is the date of the publication?

Trial Examiner Royster: Well, of course, you are having it identify itself because the witness has not identified it.

Mr. Constantine: All right.

Mr. Ward: What is the date of it?

Mr. Constantine: March 1950.

Trial Examiner Royster: March 1950.

Mr. Ward: I would object to it being offered in support of unfair labor practice on the ground, on the ground that Section 8 (c), which is the rule of evidence, would give that immunity; if it is being offered in support of [84] any unfair labor practice.

Trial Examiner Royster: Now, you are offering this for the contents of the convention report as well as the fact that it appears to have been written by Mr. O. M. Sarrett?

Mr. Constantine: Yes, sir.

Trial Examiner Royster: Now, the only testimony with respect to this is that he has seen this particular issue distributed in the mill by Fred A. Martin and by Bill Conrad.

(Testimony of Ralph Stuck.)

Mr. Constantine: Both who are shop stewards but there is also evidence that similar issues, that is he said every month, that were distributed.

Trial Examiner Royster: Oh, well, similar issues; where are we going to go with similar issues?

Mr. Flood: That is a mere conclusion.

Mr. Constantine: Well, perhaps I used the wrong word. That he has seen "The Shingle Weaver" distributed.

Trial Examiner Royster: I know; well, suppose he has?

Mr. Constantine: I want to show two things, your Honor; that it is the official publication of the respondents and that what is in there represents the parlance of the trade, declarations against interests against the respondent unions. That is all that I am offering it for. But I do realize that I have a problem of showing that it is the respondent's paper and that is why I brought out the fact that [85] other issues also were distributed.

Trial Examiner Royster: Well, of course, this speaks as of March 1950, more than two years ago.

Mr. Constantine: Oh, I intend to bring others in, your Honor, to show that the attitude as expressed there has been the attitude right up to date. I will connect that.

Mr. Ward: That is why I am going to object to it, your Honor. If that is offered in support of any unfair labor practice then I say I am going to invoke the rule of evidence, Section 8 (c) of the

(Testimony of Ralph Stuck.)

Taft-Hartley law if that paper is solely for the purpose of showing an unfair labor practice.

Trial Examiner Royster: Well, I do not think that Section 8 (c) would have any particular application to it.

Mr. Ward: In addition, of course, it is hearsay.

Trial Examiner Royster: Well, I am going to reserve ruling on this until after lunch.

Mr. Constantine: All right, may I have then this next issue of "The Shingle Weaver" which is for January 1952 marked for identification as General Counsel's Exhibit No. 3.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

and I will show it to counsel before I ask the witness [86] questions about it.

Q. (By Mr. Constantine): All right, now I will show you General Counsel's Exhibit No. 3 which has been marked for identification, Mr. Stuck, which is "The Shingle Weaver" for January 1952 and I will ask you if that was distributed in your plant at some time this year? A. It was.

Q. And do you know who distributed it?

A. It was brought to the mill by Mr. Bill Conrad.

Mr. Constantine: All right, I will offer General Counsel's Exhibit No. 3 in evidence, Mr. Examiner.

Trial Examiner Royster: Is there objection to this?

Mr. Ward: The same objection.

(Testimony of Ralph Stuck.)

Trial Examiner Royster: All right, the same ruling. I will reserve ruling on it until after lunch.

Mr. Constantine: May I have "The Shingle Weaver" for March 1952 marked for identification as General Counsel's Exhibit 4?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Constantine): I will show you General Counsel's Exhibit No. 4 which has been identified and which is a copy of "The Shingle Weaver" for March 1952 and ask you was that distributed in your shingle mill, shake plant or both? [87]

A. In the shingle mill.

Q. In the shingle mill? A. Yes.

Q. Who distributed it?

A. Mr. Bill Conrad.

Q. I see.

Mr. Constantine: All right. I will offer General Counsel's Exhibit No. 4, your Honor, on behalf of the General Counsel.

Trial Examiner Royster: The same objection?

Mr. Flood: The same objection.

Trial Examiner Royster: All right. The same ruling.

Mr. Constantine: I don't, I am sorry, I don't quite know what the objection is. Is the objection on the ground that it is protected by Section 8 (c) and on no other grounds so that I will know how to argue if we have to argue on it, or is it on other grounds?

(Testimony of Ralph Stuck.)

Trial Examiner Royster: I don't know about that. I don't think that Section 8 (c) has any particular application here.

Mr. Constantine: Well, I take it that no other objection has been advanced; I may be wrong.

Miss Krug: There was the objection of hearsay by Mr. Ward.

Trial Examiner Royster: Now, in each case you are [88] offering the marked portion or rather you are calling particular attention to the marked portion to support some part of the theory of the case?

Mr. Constantine: Yes, sir. But I do wish that all of it is in for the question of showing that it is an official publication.

Trial Examiner Royster: I see.

Mr. Constantine: On the merits, however, only the marked portions.

Trial Examiner Royster: All right.

Mr. Constantine: May I continue?

Trial Examiner Royster: Yes.

Q. (By Mr. Constantine): All right, now, Mr. Stuck. Do you know Mr. Jack Butters?

A. Yes.

Q. And what was his position with Sound Shingle and until when?

A. He was the superintendent of the Sound Shingle Company up to January 12th, 1952.

Q. All right. Did you have some talk with him about January 10th, that would be the day before the North Shore shingles came in 1952?

(Testimony of Ralph Stuck.)

A. In the morning of the 10th of January Mr. Jack Butters came into the office and asked me if we were going to have any shingles that were coming in for his shake plant. [89]

Q. And was there some reason for that?

A. We were out of stock for the shake plant. We would be out of stock for the shake plant. We had shut down the third shift on Wednesday in order to try to continue through the week but we would not be able to have enough shingles to run us through the week.

Q. And when he asked if you had any shingles coming in, what did you say?

A. I said that we had a car coming from North Shore Shingle Company in Vancouver, British Columbia.

Q. Did he say anything further?

A. He told me——

Mr. Flood: Just a moment. I am going to object to what Jack Butters said. He is superintendent and managerial.

Trial Examiner Royster: I don't see how it is competent evidence.

Mr. Constantine: He is a member of Local 2580, your Honor.

Mr. Flood: That does not render him immune. He is a representative of management.

Trial Examiner Royster: I will sustain the objection.

Mr. Constantine: All right.

Q. (By Mr. Constantine): Well, now, on Fri-

(Testimony of Ralph Stuck.)

day, January 11th, 1952, did you have a, some shingles come in, did you [90] say?

A. That is right.

Q. From the North Shore Shingle Company of British Columbia, Canada?

A. Yes, that is right.

Q. About what time were they spotted?

A. Well, it was between 4:00 o'clock and 4:30 o'clock in the afternoon January 11th, 1952.

Q. And what time does the afternoon shift start?

A. At 2:45 o'clock p.m.

Q. Now, they came directly from British Columbia, via the Great Northern Railway?

A. Right.

Q. And you are familiar with the contract between North Shore and the Sound Shingle Company?

A. That is right.

Q. Were you present at the time it was executed?

A. No, I was not.

Q. But you do know the terms of it?

A. I do, yes.

Q. And do you know what was supposed to be done to the shingles which came from North Shore that day?

A. That is right.

Q. What was supposed to be done?

A. The shingles were supposed to be unloaded and processed [91] in our shake plant and re-loaded and shipped on as per directions to their customers.

Q. North Shore's customers?

A. North Shore's Shingle Company's customers, yes.

(Testimony of Ralph Stuck.)

Q. Now, shortly after the shingles did arrive on January 11th, did the men work on them?

A. No.

Q. Did anyone speak to you about the men working on them?

A. When the car arrived the crew went out there and very shortly Mr. Jack Butters came back in and said——

Mr. Flood: Now just a moment. I will object to what Mr. Butters said.

Trial Examiner Royster: All right, the objection is sustained.

Mr. Constantine: Well, wait a minute. I have a right to show what Jack Butters said and to what the men did, after all.

Trial Examiner Royster: Why have you? Where is Mr. Butters? Bring Mr. Butters in and let him testify. He knows what the men did. This man does not know except by what Mr. Butters told him.

Q. (By Mr. Constantine): Well, did the men work after Mr. Butters came to see you?

A. No.

Q. What time did he come to see you? [92]

A. Oh, about 4:40 o'clock p.m., shortly after the car had been spotted.

Q. Is that the quitting time for the men on the second shift?

A. No, it is not.

Q. Did anybody work at all after Mr. Butters saw you? A. No.

Q. In the shake mill? A. No.

(Testimony of Ralph Stuck.)

Q. Has anybody worked in the shake mill since then? A. No.

Q. As a result of the talk that you had with Mr. Butters——

Mr. Flood: Just a moment, I object to the form of the question.

Trial Examiner Royster: I will overrule the objection.

Q. (By Mr. Constantine): As a result of the talk that you had with Mr. Butters you did at some time get a hold of Mr. Brown in Bellingham?

Mr. Flood: Just a minute please. Will the trial examiner permit me to form my objection? I object to it on the ground that it assumes that there was a conversation with Butters, and the conversation with Mr. Butters and the management are incompetent and action as a result thereof is equally incompetent.

Mr. Constantine: No, I disagree. [93]

Trial Examiner Royster: The action is alright. The contents of the conversation is not admissible as hearsay. The fact of the conversation is not hearsay. Now, there was a conversation and then thereafter——

Q. (By Mr. Constantine): All right. Some time you did talk to Mr. Arthur Brown, did you not?

A. My first action was——

Q. Will you please just answer my question.

A. Yes, it was.

Q. Did you talk to Mr. Brown? A. Yes.

Q. When did you talk to him?

(Testimony of Ralph Stuck.)

A. On the morning of, Saturday morning, January 12th, 1952.

Q. Was it on the telephone or was it in person?

A. It was on the telephone.

Q. Where was he?

A. He was at Bellingham.

Q. All right, now. Tell us what he said and what you said.

A. I made arrangements for a conference with Mr. Brown at our mill with Mr. Martin on Sunday, January 13th, 1952.

Q. All right. That is about all there was to that conversation?

A. That was all there was to it, yes.

Q. All right. Now, where was the meeting to be held, at your office? [94]

A. At the office of the Sound Shingle Company in Marysville, Washington.

Q. Was that meeting held? A. Yes.

Q. Were you present? A. I was.

Q. And about what time did Mr. Brown come in?

A. It was around 4:00 o'clock p.m. to 4:30 o'clock p.m. or right around that time; between 4:00 o'clock p.m. and 4:30 o'clock p.m.

Q. Did anyone accompany Mr. Brown?

A. Mr. Uttley.

Q. Now was there anyone else there besides you on behalf of the company?

A. Mr. John E. Martin and his wife and Mr. Frank S. Barker and Mr. Dick Tidy, and myself.

Q. All right. Now, do you recall who did the

(Testimony of Ralph Stuck.)

talking when Mr. Brown and Mr. Uttley came in?

A. As they came to the door I came up and went to the door and let them in the office and Mr. Brown said that he was too tired to talk about it at that time and he wanted to arrange for a meeting the next day, and Mr. Martin told him to "come on in, Art", and he told him that he wanted to get the shake plant going Monday, and Mr. Brown said that he was too tired to discuss the matter at that time and that he [95] wanted to make arrangements for the meeting for Monday, January 14th.

Q. All right. There were arrangements made for a meeting the next day?

A. Yes. Mr. Uttley was to be present and arrangements for time for him to get over to the mill, and it was arranged at 4:00 o'clock p.m. the next day.

Q. All right. Now, that meeting did not last long?

A. No, that was very short. It was very short.

Q. And Mr. Brown and Mr. Uttley left?

A. That is right.

Q. Did anyone else from the unions, either the council or local 2580, come that day?

A. Yes. That is right.

Q. Who did? A. Mr. Sarrett first.

Q. How long after Mr. Brown left?

A. Oh, I imagine about 20 or 25 minutes.

Q. None of you people on behalf of the company had left in the meantime?

A. No, we were all there.

(Testimony of Ralph Stuck.)

Q. All right. Do you know Mr. Sarrett?

A. I have have met him; I met him that day.

Q. And he was introduced as what?

A. As the representative for the District Council. [96]

Mr. Flood: Just a moment. Who introduced him?

The Witness: Mr. Martin.

Mr. Flood: What Mr. Martin, the proprietor?

The Witness: Mr. John E. Martin.

Q. (By Mr. Constantine): One of the partners of the Sound Shingle Company?

A. That is right.

Q. When he introduced him Mr. Sarrett did not deny anything, did he?

Did he deny that he was a representative of the District Council? A. No.

Q. All right. Was there any talk between anybody then?

A. Yes, there was a short discussion in regard to the situation and Mr. Sarrett admitted that he could not answer the questions so he went outside to bring in another member of the District Council.

Q. What was his name? A. Fred Baker.

Q. And you met Mr. Baker then?

A. Yes, that is right.

Q. Who introduced Mr. Baker? Had you known him before that? A. No, I had not.

Q. Did he say who he was besides saying he was Mr. [97] Fred Baker?

A. He said he was a representative of the Dis-

(Testimony of Ralph Stuck.)

trict Council, he was from Wheeler, Oregon, representing the Oregon district of the District Council.

Q. Do you remember Mr. Baker's first name?

A. Fred.

Q. Was there any conversation after Mr. Baker came in? A. Yes.

Q. Do you remember it? A. Yes.

Q. All right. Give what you know?

A. Mr. Martin asked Mr. Baker why we could not process Canadian shingles in our shake plants when they were being run in the mills in Seattle, and he stated that it was against, it was directly against the union policy to permit Canadian shingles to be run in the mills in the United States and that he was not aware there were any shingles being run in Seattle, and he turned to Mr. Sarrett and asked him if that were true and he said that there were a few being run in Seattle. He also stated that the reason that the shingles were not being permitted was that due to the wage and hours, and working conditions in the mills in British Columbia that they did not recognize, would not permit the use of shingles down in the United States.

Mr. Sarrett admitted that there were a few but Mr. [98] Martin brought to his attention that, in fact named Color Shake in Seattle that was using them exclusively.

Q. What did Mr. Sarrett say to that?

A. Mr. Sarrett said that that was due to some special agreement that they had with Mr. Brown.

(Testimony of Ralph Stuck.)

Q. Was there any further conversation?

A. Well, then Mr. Martin brought to the attention that the shingles were from the North Shore Shingle Company were manufactured by a CIO union in British Columbia.

Q. Was there any reply to that?

A. Mr. Baker stated that that did not make any difference. They did not recognize the CIO union there because of the wages and hours and working conditions. And Mr. Martin brought to their attention that, in fact he mentioned too the Hunting-Merritt and the Meeker Mills in British Columbia that had collective bargaining agreements with the A. F. of L.

Q. And was anything said to that when Mr. Martin mentioned those two mills?

A. That was so, but until such time——

Q. Mr. Constantine (interposing): Who spoke in reply?

A. Mr. Baker.

Q. What did he say?

A. He said that that was true but until such time as the A. F. of L. unions in British Columbia had the same working [99] agreement, conditions, wages and hours that they would not recognize them. In fact, that the representative from those mills had attended their convention but they had no vote in the convention until their working conditions became the same and until then they would be admitted to the District Council.

Q. Was there any other conversation?

A. Well, he also stated that he had been to the

(Testimony of Ralph Stuck.)

convention and that they had passed a resolution.

Q. Who is he?

A. Mr. Sarrett stated that the convention had passed a resolution hiring four men to assist Mr. Sarrett in the stopping of the Canadian shingles in the United States in the same manner that he had stopped them in California.

Q. Is that about the conversation?

A. That is about the conversation.

Q. And then they left?

A. That is right.

Q. You did not see any other union representatives that day? A. No.

Q. But the next day there was a meeting between the company and the union representatives?

A. That is right.

Q. That is January 14th. [100]

A. That is January 14th, 1952, Monday.

Q. About what time did that occur?

A. 4:00 o'clock in the afternoon.

Q. Now, did the employees in the shake mill come to work on January 14th?

A. They came and reported down to the plant and stood around to see what was going to happen, and I brought to their attention that fact that there were shingles that were being run in Seattle and that I could not see why that we would not be permitted to run the shingles there at our plant in Marysville. Mr. John A. Martin and Mr. Bill Conrad were there at that time and they stated that

(Testimony of Ralph Stuck.)

they were going up to see Mr. Brown about it at that time. They left but they did not return.

Q. They did not work at all on Monday, January 14th, 1952? A. No, sir.

Q. Have they worked since Monday, January 14th, 1952?

A. No, they have not, not in the shake plant.

Q. In the shake plant? A. That is right.

Q. The shake plant has been closed since then?

A. That is right.

Q. All right. Now about what time on January 14th did the conference with the union officials take place? A. Around 4 o'clock p.m. [101]

Q. All right. Who was present on behalf of the company?

A. Mr. John E. Martin, Mr. Dick Tidy and myself.

Q. And who was there on behalf of the union?

A. Mr. Art Brown, Glenn Uttley, Bill Conrad and John A. Martin.

Q. Bill Conrad is the shop steward of the shingle mill? A. Yes.

Q. In the shingle mill of the local?

A. Yes, that is right.

Q. And Mr. John A. Martin is the shop steward of the local in the shake mill?

A. That is right.

Q. All right. There was some conversation, I suppose? A. That is right.

Q. Give it to the best of your recollection.

A. Well, it was just the usual conversation at

(Testimony of Ralph Stuck.)

first and then finally Mr. Brown asked Mr. Martin what he wanted to talk about and he said he was interested in——

Q. (Interposing): I wish you would not say "he". Who said what?

A. Mr. John E. Martin said he wished to get the shake plant in operation as soon as possible because it was costing us money to be idle, and Mr. Brown stated that if he wanted to get the shake plant running they would have to start the mill up and run their own shingles or process American-made [102] shingles.

Q. Now, the Mr. Martin that we are talking about is—— A. John E. Martin.

Q. Mr. John E. Martin, a partner?

A. Yes, that is right.

Q. And when you come to the other Mr. Martin because he was also present——

A. (Interposing): I see.

Q. You use his initial, will you please?

A. Right.

Q. So far you have been talking about Mr. John E. Martin?

A. Mr. John E. Martin, that is right.

Q. All right.

A. And Mr. John Martin called Mr. Brown's attention that we had a contract with North Shore Shingle Company to process shingles into shakes and to re-ship them to their customers and also that they anticipated building a staining plant there in Marysville to process these Canadian shakes, to

(Testimony of Ralph Stuck.)

stain the Canadian shakes. And Mr. Brown stated that if they wanted to do that they would have to build their mill some place else, their staining plant some place else because they would not be permitted to operate their shake plant or their staining plant there in Marysville on Canadian shingles and shakes.

Q. All right. [103]

A. And several times Mr. Brown stated that they absolutely would not let them run Canadian shingles and shakes there in our plant in Marysville.

Q. Did he give any reason why or did he just say you can not run them?

A. Well, that the Canadian shingles——

Q. Well, did he give a reason?

A. No, not at that time.

Q. Did he give any reason at that conference.

A. Other than that they were unfair——

Mr. Flood: Just a minute, just a minute. Let him complete his answer.

Q. (By Mr. Constantine): Go ahead; “Other than that they were unfair?”

A. Other than that he stated that the Canadian shingles were considered unfair due to the working conditions in Canada and that they would not permit the running of them in our plant in Marysville.

Q. Was there any other further conversation?

A. Yes. Mr. Martin, John E. Martin said to Mr. Brown “For the record, Art, you are calling the boys off the job?” and Mr. Brown said “No, that

(Testimony of Ralph Stuck.)

the men refused to work on the Canadian shingles.” And Mr. John E. Martin turned to Mr. John A. Martin and said, “Is that right, Johnnie?” And Mr. John A. Martin turned to Mr. Brown and said, “We refused [104] to run the Canadian shakes and shingles because you ordered us not to.” And Mr. Brown said, “Well, for the record we called the boys off. We are absolutely not going to let them run on Canadian shingles.” And there was a short discussion there in regard to certain parts of the contract, and the union members left the office and they were talking outside the building.

Q. Who was talking outside?

A. Mr. Brown, Mr. Uttley, Mr. Conrad and Mr. John A. Martin and they talked for a few minutes and then Mr. Brown called back into the office to Mr. John E. Martin.

Q. You could hear that?

A. Yes, I did. They told him that if he wanted to that they would send him a letter stating the union’s position, and Mr. Martin said, “Well, it is a little bit late to give us a letter on that, the men have already been pulled off the job.”

Q. All right, now. How long did the Canadian car of shingles, of North Shore, remain on your siding there?

A. Until February 1st, 1952.

Q. And then it was shipped somewhere else?

A. Yes, that is right.

Q. It was never worked on by the men?

A. No it was not.

(Testimony of Ralph Stuck.)

Q. The shake mill is still closed down? [105]

A. That is right.

Q. Is there some reason why it is closed down?

A. Lack of business for the shake plant other than the orders that we have for processing the shingles from North Shore Shingle Company.

Q. What is that; say that again.

Trial Examiner Royster: Oh, don't have him say it again.

Mr. Constantine: I did not hear it.

Trial Examiner Royster: Well, have the reporter read it then.

(Answer read.)

Trial Examiner Royster: The plant was shut down for lack of business, for other than the business of the North Shore business.

Mr. Flood: That is right.

Q. (By Mr. Constantine): There is business from North Shore now at the shake mill?

A. That is right.

Q. Is it being done?

A. No.

Mr. Constantine: I have no more questions.

Trial Examiner Royster: Well, this is a convenient time to recess for lunch, I suppose. Can we get back in one hour? [106]

All right, we will recess until 1:30 o'clock p.m.

(Whereupon, a recess was taken until 1:30 o'clock p.m.) [107]

(Testimony of Ralph Stuck.)

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock p.m.)

Trial Examiner Royster: On the record.

I have considered the matter of admitting General Counsel's Exhibits Nos. 2, 3 and 4 during the noon recess, and the ruling is that they are admitted into evidence.

(The documents heretofore marked General Counsel's Exhibits Nos. 2, 3 and 4 for identification, were received in evidence.)

[See pages 12-30 of this printed Record.]

Mr. Ward: I think the record is sufficiently clear with respect to our objections to the exhibits, sir.

Trial Examiner Royster: Yes, I believe so.

Cross-Examination

Q. (By Mr. Ward): Mr. Stuck, how long have you been employed by Sound Shingle Company?

A. The present owners, since the day they purchased the mill the 15th of January, 1951.

Q. Your duties are primarily of a clerical nature? A. That is right.

Q. You have nothing to do with the production of either shakes or shingles?

A. No, I have no direct, no, in the shop itself, no.

Q. In other words, your duties confine you substantially to the office? [108]

A. The office manager.

(Testimony of Ralph Stuck.)

Q. Are you familiar with the terms of the agreement with North Shore Shingle Company?

A. I am.

Q. Do you know if the agreement contained a provision with respect to a union label?

A. Not to my knowledge.

Q. You do not recall whether or not there was any provision for a union label in the agreement?

A. No, sir.

Q. Now, on January 11th, 1952, when the car came to the plant with the shingles, when did you first learn that the men refused to work on those shingles?

A. It was approximately about ten minutes after the car arrived.

Q. When was that, about ten minutes after the car arrived and you were in your office?

A. That is right.

Q. And what happened?

A. Mr. Jack Butters came in to the office and told me that the men had gone home and refused to work on the British Columbia shingles.

Q. They had gone home?

A. That is right.

Q. Was Mr. Brown present? [109]

A. No, he was not.

Q. Was there any official of either of the two respondents in this proceeding, the District Council or the local union present at the time?

A. If you would regard the shop steward as a representative, the shop steward was there.

(Testimony of Ralph Stuck.)

Q. The shop steward was there? A. Yes.

Q. There were no officers of the District Council there? A. No.

Q. And there were no officers of the local union there?

A. As I say, I don't know the officers unless, I don't know just what the status of the shop steward is in regard to the local but the shop steward was there.

Q. The first thing that you were told about it was that the men had gone home?

A. That is right.

Q. Do you know if the Sound Shingle had the use of the union label from the District Council?

A. They were using it, but as far as any agreement with the label I had no knowledge of any agreement whatsoever.

Q. You had no copy of any agreement?

A. None whatsoever.

Q. You did not sign any agreement?

A. Other than these, I signed the contract or this agreement [110] here.

Q. But as far as you knew or as far as you would gather from information from your duties you did not know anything about the union label in the Sound Shingle Company? A. No, sir.

Q. Did you know there was a union label in use?

A. I had from time to time purchased, not purchased but ordered labels and received labels in the office there from the Red Cedar Shingle Bureau and on that label there is a union label.

(Testimony of Ralph Stuck.)

Q. And that was a shipping label which Sound Shingle would put on bundles of shakes or shingles, is that right?

A. That is right.

Q. And that shipping label contained imprinted on it the label of the United Brotherhood, is that right?

A. That is right.

Q. You had seen one of those?

A. That is right.

Q. And every bundle of shingles that went out of the plant would have one of those shipping labels on it?

A. I did not see the bundles, see them on there. I did not actually have anything to do with the loading of the shingles whatsoever. All I did was, they were ordered and I could not say that they were on every bundle of shingles that left that plant.

Q. Were those labels, the company labels, the shipping labels kept within your custody?

A. No, they were not.

Q. Where were they kept?

A. In the supply room out by the shingle mill.

Q. So you do not know whether a bundle of shakes or shingles shipped out of your company would have your company label on it?

A. I could not swear that they all had them on, no. I would assume that they did.

Q. You assume that any bundle of shakes or shingles shipped would have your company's label on it, wouldn't you?

A. That is right.

Q. Now with respect to the Canadian shingles

(Testimony of Ralph Stuck.)

they would be processed, the contract called for processing? A. That is right.

Q. The contract would call for bundling in bundles? A. In this case they would.

Q. The contract would call for your seeing them on a car to be shipped, your company?

A. I did not quite get that.

Q. The contract would call for your company shipping the bundles of shingles or shakes?

A. We would bill them out of our mill in the name of the North Shore Shingle Company. [112]

Q. Would a shipping label have been placed on those bundles?

A. Not a shipping label.

Q. Well, what would be on it?

A. Primarily either that or, there was no provisions in the contract for the label on those shingles there anyway.

Q. You mean no shipping label? A. No.

Q. The shingles or shakes, or shingles made into shakes would simply be bundled and shipped without a shipping label, is that right?

A. That is right. There was nothing in the agreement as far as I was concerned that had anything to do with the applying of the label on the shakes.

Q. You are talking now about the oral agreement? A. That is right.

Q. Forgetting for the moment the oral agreement, bundles of shingles and shakes are shipped out of your plant with a shipping label, is that right? A. Normally, yes.

(Testimony of Ralph Stuck.)

Q. Normally.

They are not just bundled and shipped without any label on them, are they? A. No.

Q. Somewhere on that label would appear some identification [113] that Sound Shingle, that it was a Sound Shingle product?

A. Not particularly. In some cases it would be the union stamp and in some cases it would be the certigrade label.

Q. The certigrade label was a label that all members of the association used, is that right.

A. Members of the Red Cedar Shingle Mill; not all mills are members of the Red Cedar Shingle Bureau.

Q. But Sound Shingle is a member?

A. That is right.

Q. And the Sound Shingle would then would place an association shipping label on its bundles, would it not?

A. As I say, not all of them.

Q. Well, what other kind of labels did you have?

A. The rubber stamp, the union rubber stamp.

Q. That is a union label?

A. That is right.

Q. Well, under the contract with North Shore you would ship the shakes bundled with the label on them, wouldn't you? Now, when I say a label I mean with a shipping label, forgetting for the moment the union label.

A. So far as the oral contract goes.

(Testimony of Ralph Stuck.)

Q. I am not talking about the oral contract.

A. All right.

Mr. Constantine: Well, what contract is he talking about? There is no other contract before your Honor between [114] Sound Shingle and North Shore.

Mr. Ward: It is difficult to get from the witness who apparently has been there any number of years but does not seem quite to know that the products are shipped with a label on them. That is all I am inquiring about. I can do it the hard way.

The Witness: We have some.

Trial Examiner Royster: Well, ask the question.

Mr. Ward: That is what I am trying to do.

Q. (By Mr. Ward): Well, to get down now, we have bundles of shingles and bundles of shakes.

A. Right.

Q. A label is put on those and when I say a label it is either the Sound Shingle Company's label or, as a member of the Association, the Association label.

A. Right.

Miss Krug: I will object. Excuse me. Go ahead.

Mr. Ward: Is it all right now? So far?

Miss Krug: Well, you said shingles and shakes and my objection is that I wish you would specify what you are referring to in your question, shingles or shakes.

Mr. Ward: The products of the Sound Shingle Company whether they are shakes or shingles are bundled and shipped, is that right?

A. That is right. [115]

(Testimony of Ralph Stuck.)

Q. Now there is either one or two labels placed on those bundles?

Mr. Constantine: I am confused with the word "products." Does he mean anything they make for themselves or for others or only their own products?

If the question is ambiguous I want to object on the ground of ambiguity.

Mr. Ward: Sir, it is immaterial to me whether this company makes shoes or canned tomatoes. I am asking questions concerning a shipping label. Now whether that shipping label is put on cans of sturgeon is wholly immaterial.

Trial Examiner Royster: Anything shipped from the Sound Shingle Company?

Mr. Ward: That is precisely what I am trying to get, sir.

Trial Examiner Royster: Anything from the shipping dock there.

Mr. Constantine: All right.

Mr. Ward: I will call it products.

Q. (By Mr. Ward): Is a shipping label put on those bundles? A. That is right.

Q. That is right. Now on that label, and you probably have seen them, there is a union label, isn't there, printed [116] right on the company's shipping label? A. That is right.

Q. Now we come to the contract with North Shore? A. Yes, sir.

Q. That called for your company to process shingles into shakes, is that right?

(Testimony of Ralph Stuck.)

A. That is right.

Q. The shakes would be bundled, wouldn't they?

A. That is right.

Q. For shipping? A. That is right.

Q. A shipping label would be placed on that bundle?

A. Only on the insistence of the union.

Q. No, I am talking about a label.

Mr. Constantine: I submit that he has answered the question, your Honor. He said, "Only upon the insistence of the union." That is the answer.

Q. (By Mr. Ward): All right, what kind of label would that be?

Miss Krug: If the court please, I object to this for the reason that the testimony heretofore has been that not one single solitary bundle of these shakes for North Shore ever went out of that plant.

Trial Examiner Royster: This is all speculative. I will sustain the objection. [117]

Q. (By Mr. Ward): Well, every bundle of shakes or shingles that went out of Sound Shingle had a shipping label on them, either one or two kinds, either Sound Shingle's name appeared on the label or as a member of the Association, the trade name, so to speak, is that right?

A. Every bundle that has gone out of there so far has had that on there.

Q. Right. On those labels, on your shipping labels would be the union label. When I say the union label, an imprint of the United Brotherhood label, is that correct? A. That is correct.

(Testimony of Ralph Stuck.)

Q. Now, would you have done the same thing with the Canadian label?

Mr. Constantine: I object.

Miss Krug: I object.

Trial Examiner Royster: I will sustain the objection.

Q. (By Mr. Ward): Would you have shipped the bundles of shakes out without a label on them?

Miss Krug: The same objection.

Trial Examiner Royster: Well, I think you are entitled to show whatever plan they may have had for the Canadian shakes.

Mr. Ward: That is what I am trying to do.

Trial Examiner Royster: Whatever plan they ever had.

Mr. Ward: I am trying to show that plan, sir, but [118] there is a technical objection because, if I might say so, sir, and if I may be permitted to say so——

Trial Examiner Royster: Go ahead and ask the witness if there was any decision reached as to what would be done with respect to these Canadian shakes.

Mr. Ward: First I asked him whether the oral contract contained any such provision and he said no, and I then asked him some general questions with respect to the custom and practice of the company in shipping bundles of shakes.

Trial Examiner Royster: All right; you got that.

Mr. Ward: I got that.

(Testimony of Ralph Stuck.)

Q. (By Mr. Ward): Now what would you have done with these Canadian shingles?

Mr. Constantine: I object to the question, your Honor.

Trial Examiner Royster: I think that it is objectionable because it assumes that a decision had been made, what they would have done with these Canadian shingles and I think that you have got to cover that step before you come to it.

Q. (Mr. Ward): What were you going to do with the Canadian shingles?

Miss Krug: The same objection.

Trial Examiner Royster: Overruled at this point.

The Witness: Process them into, the Canadian shingles would be processed into shakes. [119]

Q. (By Mr. Ward): And bundled?

A. Right.

Q. And a shipping label put on them?

A. Not particularly.

Q. Well do you ship things out of your plant without a label on them, a shipping label indicating what company it came from?

A. The label is put on there at the insistence of the union.

Q. Do you mean that that is your company's shipping label? A. That is right.

Q. That is put on at the insistence of the union?

A. That is right.

Q. If the union did not insist your company would bundle shingles without any shipping indication, any indication where they came from?

(Testimony of Ralph Stuck.)

A. We have a stencil that has our name on it by which our products could be identified.

Q. Do you use that stencil all of the time?

A. The only time when we use that is when our name is not on the product in any other place.

Q. I see.

And then you might have contemplated using the stencil label on these Canadian shingles?

Mr. Constantine: I object. [120]

Miss Krug: I object.

Trial Examiner Royster: I will sustain the objections to that which I consider to be a continuing one.

Mr. Constantine: Yes.

Q. (By Mr. Ward): Where would you obtain the stencil from?

A. It is my understanding that stencils and ink are under the control of the Everett local.

Q. The Everett local? Do you mean the respondent in this case?

A. That is right.

Q. Would you go over and communicate with the local or have it sent over or you would go over and get it?

A. They would send it over to us.

Q. Did you ever go over personally?

A. I was not familiar with the procedure at one time and I went to the printing office and tried to arrange for a stamp. I was under the understanding that the stamp was to be had by the printing company, and they, in turn, referred me, told me

(Testimony of Ralph Stuck.)

that it was supplied by the, to be supplied by the unions themselves.

Q. You were told that? A. That is right.

Q. How long was that oral contract for?

It was dated sometime in December 1951, and how long [121] was it for?

A. That provision of the contract I am not familiar with.

Q. You mean you do not know when the contract expired? A. That is right.

Q. Is the contract in force now?

A. It is.

Q. How do you know?

A. At such time as the union will permit the men to work on Canadian shingles it is my understanding that the contract is still in force and that it would be completed at such time as the union would permit the men to process Canadian shingles.

Q. I believe you testified that your company shipped \$40,000.00 worth of products out of the state of Washington? A. That is right.

Q. Do you know where most of that \$40,000.00 went? Was it to one consignee or to several?

A. No, it was to several different customers.

Q. Do you recall whether any of that \$40,000.00 was consigned to Perma Products?

A. No, sir.

Q. None was? A. None whatsoever.

Mr. Ward: That is all.

Trial Examiner Royster: Is there anything further of [122] this witness?

(Testimony of Ralph Stuck.)

Mr. Constantine: I have just a couple of questions, Mr. Examiner.

Re-direct Examination

Q. (By Mr. Constantine): You stated that at the time that Mr. Jack Butters spoke to you that the men would not work on the British Columbia shingles the shop steward was there. Which shop steward? Was it Mr. Bill Conrad or John A. Martin?

Mr. Flood: Just a moment.

Mr. Ward: I believe his testimony was that somebody came in and told him the men had gone home. There is no refusal to work there.

Trial Examiner Royster: Well, then the question was asked as to what possible representatives of the union were present at the time.

Mr. Ward: He said the shop steward.

Q. (By Mr. Constantine): I would like to have him identify the shop steward.

A. John A. Martin, the shop steward in the shake plant.

Q. In the shake plant? A. That is right.

Q. And the union label which you have just talked about is put on by whom when it is put on?

A. Well, it is put on by the packers. [123]

Q. Are they all members of the local 2580.

A. I would assume that they are. I could not swear that they were but I would assume that they were.

(Testimony of Ralph Stuck.)

Q. There is a union shop clause in your contract?

A. That within thirty days they have to become—if a man is over there thirty days he has to become a member of the union or his job is terminated; I mean, he is terminated from his job.

Mr. Constantine: All right, that is all that I have.

Miss Krug: May I ask one question, please?

Trial Examiner Royster: Yes.

Cross Examination

Q. (By Miss Krug): In response to Mr. Ward's question you stated that you signed this agreement. Would you identify the agreement to which you referred at that time?

A. I am referring to Exhibit No. 4.

Trial Examiner Royster: Respondent's Exhibit No. 4.

The Witness: It is the 1950 agreement which is still in effect inasmuch as no new agreement has been negotiated upon.

Miss Krug: That is all that I have.

Trial Examiner Royster: Is there anything further of this witness?

Mr. Ward: Just excuse me two minutes. I hate a penalty for holding; I realize that. [124]

Re-cross Examination

Q. (By Mr. Ward): Do the employees in the

(Testimony of Ralph Stuck.)

shake mill and the employees in the shingle mill belong to the same labor organization?

A. I believe so. I don't know anything about their unions. I mean I am not—I don't know anything about their unions. I would assume that they are all of the local 2580.

Q. They are covered by that contract, Respondent's Exhibit No. 4, aren't they?

A. Well, as far as this agreement goes there is nothing in the agreement that says anything about the shake plant.

Q. You don't know what employees that agreement covers, do you?

A. Well, at first according to the agreement there.

Q. It is all the employees of the company, is it not?

Mr. Constantine: I submit that it speaks for itself, Mr. Examiner.

Trial Examiner Royster: Yes, I think it does. Well, have you not given in effect as if it applied to all employees?

Mr. Constantine: I don't think there is any issue there.

The Witness: That is right.

Trial Examiner Royster: I guess that that is all then, Mr. Stuck. [125]

Off the record.

(Discussion off the record.)

Trial Examiner Royster: On the record.

Mr. Constantine: I will call Mr. Walter Harold Nelson.

WALTER HAROLD NELSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Will you state your full name, please.

A. Walter Harold Nelson.

Q. And you live where?

A. Marysville, Washington.

Q. And you are an employ of the Sound Shingle Company in the shake mill?

A. I was in the shake mill.

Q. And what did you do in the shake mill?

A. I opened bundles.

Q. You took them out of the cars?

A. I opened the bundles and put them on the roll for the shake machines and other labor around there too, you see.

Q. And you are a member of local 2580, Everett local?
A. Yes, that is right. [126]

Q. Do you know who the president of the local is?
A. I think it is Art Brown.

Q. That is the District Council. I am talking about your own local.

A. No, I don't know.

Q. You don't know? Well, do you know who the shop steward of your local is?
A. Yes.

Q. In the shake mill?
A. Yes.

Q. Who is that?
A. Mr. Martin.

(Testimony of Walter Harold Nelson.)

Q. John Martin? A. John A. Martin.

Q. And who is the shop steward of your local in the shingle mill at the Sound Shingle?

A. There is Bill Conrad.

Q. And you were an employee of the Sound Shingle on January 11th, 1952? A. Yes.

Q. That is the day the British Columbia shingles came down? A. Yes.

Q. And you were on the second shift, were you?

A. Yes. [127]

Q. What time did the second shift start?

A. A quarter of three.

Q. A quarter of three in the afternoon?

A. Yes.

Q. When you reported for work did you know that there was some shingles coming down from British Columbia? A. I heard there was.

Q. You heard there were? A. Yes.

Q. About what time did the shingles come down, do you remember?

A. Around 4:00 o'clock p.m. or 4:30 o'clock p.m. along in there.

Q. About that time in the afternoon?

A. Yes.

Q. And then you and some other fellows went over to the car to look at them?

A. Yes.

Q. Do you remember who else was there with you?

A. There was Mr. Butters and Mr. Martin and Mr. Richardson and Mr. Bockwinkel and Rosie.

(Testimony of Walter Harold Nelson.)

Q. That is Mr. Rosenbach? A. Yes.

Q. And the Mr. Martin who was with you was John A. Martin?

A. Yes, sir. [128]

Q. And do you remember what happened over at the car, Walt?

A. Yes. Mr. Jack Butters opened the car and hauled a bundle out and looked at it and it was unfair shingles and he put it back in.

Q. He said what? It was unfair shingles?

A. Yes. All of us looked at it and it was unfair shingles, B.C. shingles.

Q. And Mr. Butters put it back?

A. He put it back and shut the door and us fellows all left.

Q. Did John A. Martin say anything at the same time or about that time?

A. He said that he would not pack unfair shingles and I said that if he would not pack them I would not open any of them neither.

Q. Did he say anything more than that?

A. No.

Q. I would like to show you an affidavit to help refresh your recollection, Walt. I will show it first to counsel. Do you recall making a statement under oath to Mr. Hilbun of the National Labor Relations Board back around the 15th of February, 1952.

A. I made the statement, yes. [129]

Q. And in this statement you said, "John A. Martin said they are B.C. shingles and we won't do nothing with them. We will let them sit there."

(Testimony of Walter Harold Nelson.)

Does that refresh your recollection? Did Mr. Martin say that?

A. Well all of us that were there said the same thing I believe.

Q. Well, did Martin say it?

A. Well, I just could not remember for sure who did say it.

Q. But you do remember saying to Mr. Hilbun under oath that Martin said it.

A. Well, he must have said it or it would not be down there.

Q. Do you think it was true at the time that you told it to Mr. Hilbun, was it fresh in your mind then? A. Yes.

Q. And you think that you told Mr. Hilbun the truth at that time?

A. I think so.

Q. So does that help refresh your recollection as to what John Martin did say?

A. Well, yes I guess so.

Q. And now what was it that Martin said? Did he say that? A. Yes.

Q. He said they are B.C. shingles and we won't do nothing [130] with them? We will let them sit there? A. Yes.

Q. That is your present testimony?

A. Yes.

Q. All right. Now about a week or two before that did you have a talk with John Martin about Canadian shingles that might come down to the shingle plant?

(Testimony of Walter Harold Nelson.)

A. No. I did not know they were even on the way until Friday on January 11th.

Q. I want to show you again this affidavit which you gave to Mr. Hilbun in which you say, and I am asking you if this refreshes your recollection, "About a week or two, maybe a little longer before then, meaning January 11th, before these shingles came in we heard there was going to be some B.C. shingles in and our shop steward went up and talked to Art Brown. Then John A. Martin told us that Art Brown had said that if B.C. shingles came in not to work on them."

Do you remember telling Mr. Hilbun that?

A. I might have. I might have said almost anything at that time.

Q. Well you did sign and swear to this affidavit, did you not? A. Yes.

Q. And you were trying to tell the story the best you knew it the time? [131] A. Yes.

Q. Do you think that you might have told him that?

A. Well, I must have; it is there.

Q. Does it help refresh your recollection today?

A. No, it does not.

Q. It does not? A. No.

Q. You don't remember that John Martin told you that Art Brown said not to work on the shingles?

A. He never told me before the shingles arrived; nobody did.

Q. Well, the men did walk off the shingles after

(Testimony of Walter Harold Nelson.)

John Martin and Mr. Butters made these statements that you just said?

A. All of us left.

Q. You left them? A. Yes.

Q. Had the shift ended at the time they left?

A. The day shift had ended before, earlier in the afternoon, and the morning shift had finished around 1 o'clock p.m. or 1:30 o'clock p.m. I believe.

Q. But your shift had not ended?

A. Our shift did not have any shingles to work with before 4:30 o'clock p.m. there.

Q. There were no shingles to work with before 4:30 p.m.? [132] No.

Q. And the only shingles that you could work on were the shingles in the B.C. car?

A. Yes.

Q. And since the men did not take them out of the car there was no work for them?

A. That is right.

Q. But they went home without instructions from the company? A. Yes.

Q. No one from the company told you to go home? A. No.

Q. Now, since January 11, 1952, you have been back to the company to ask for work, haven't you?

A. Yes, I have been working.

Q. Did you work in the shake mill at all?

A. No.

Q. Did you ask the company if you could work in the shake mill? A. Yes.

Q. And what did the company say?

(Testimony of Walter Harold Nelson.)

A. I can work any time that we want to work B.C. shingles.

Q. And that is what the company said?

A. Yes.

Q. But did you work on B.C. shingles? [133]

A. No, sir.

Q. And is there some reason for that?

A. They are unfair and if we did, why, that we would be in bad with our union and everything else, and I don't want to do that.

Q. All right.

Mr. Constantine: I have no more questions.

Trial Examiner Royster: Are there any further questions?

Miss Krug: I have no questions.

Mr. Flood: May I see that affidavit please?

Cross Examination

Q. (By Mr. Flood): Mr. Nelson, the affidavit which counsel, Mr. Constantine, showed you consisting of two pages, does it not? A. Yes.

Q. You may look at it if you wish. It is your affidavit. A. I don't want to see it.

Q. It consists of about two pages? A. Yes.

Q. The affidavit is not in your handwriting, is it? A. No.

Q. You just signed it? A. Yes.

Q. Now, on April 2, 1952, you signed another affidavit at [134] the request of Mr. Constantine, did you not? A. Yes.

Q. And in that affidavit did you not say that

(Testimony of Walter Harold Nelson.)

Mr. Butters said that the bundles did not have the A. F. of L. label stamped on it and so he put the bundle back in the car? That is what you said?

You can read it if you wish. A. Yes.

Q. Is that right? A. Yes.

Mr. Flood: That is all.

Redirect Examination

Q. (By Mr. Constantine): In that same affidavit, Mr. Nelson, which Mr. Flood showed you you also said, "Mr. Martin said that they are B.C. shingles and we can't do anything with them. We will let them sit there."

That is the one that I took from you?

A. Yes.

Q. All right. And that is true? A. Yes.

Q. All right. I have no more questions.

Trial Examiner Royster: Is that all?

Mr. Flood: I've just one thing.

Re-Cross Examination

Q. (By Mr. Flood): You are working there now, aren't you? [135] A. Yes, I am.

Mr. Flood: That is all.

Trial Examiner Royster: That is all, Mr. Nelson.

Mr. Constantine: Thank you very much for coming down.

(Witness excused.)

JOE BOCKWINKEL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Will you please state your full name to the reporter?

A. Joe Bockwinkel (B-o-c-k-w-i-n-k-e-l).

Q. Where do you live?

A. Route 2, Marysville, Washington.

Q. And you are employed by the Sound Shingle Company at Marysville, Washington?

A. Yes, I am.

Q. And on January 11th, 1952, which mill were you working in, in the shingle mill or in the other mill?

A. In the shake mill.

Q. In the shake mill. You are a member of local 2580?

A. Yes.

Q. And a few days or maybe a little longer before January 11th, 1952, when the B.C. shingles came down did you have any talk with John Martin or Bill Conrad, shop stewards? [136]

A. I talked with them, with John A. Martin just about every day.

Q. I am talking about B.C. shingles.

A. I heard that they were coming in.

Q. You heard them say they were coming in?

A. Not them, particularly them.

Q. No, you heard other people.

(Testimony of Joe Bockwinkel.)

Did you discuss the B.C. shingles with Martin?
Or with Conrad? A. Not very much.

Q. Did you discuss them at all?

A. I probably did a little bit.

Q. Do you remember what you said and what
Mr. Conrad said? A. No, I don't.

Q. If I showed you an affidavit do you think
that that might refresh your recollection?

A. Yes.

Q. I will show you an affidavit dated April 2,
1952, and signed and sworn to by you before John
N. Rupp, and ask you to read this and see if it does
not help refresh your recollection as to any con-
versation that you had with Bill Conrad or John
Martin about the B.C. shingles.

A. Yes. That was after this. When I said here
was on a Monday.

Trial Examiner Royster: No, the question is
does it [137] refresh your recollection? Read it
over.

The Witness: Yes.

Q. (By Mr. Constantine): All right. Now, do
you recall what Bill Conrad and John Martin told
you about the B.C. shingles?

A. Yes. We could not run them. That was on
a Monday. That was on the 14th I guess.

Q. They told you that on a Monday?

A. That was on January 14th, I guess.

Q. That was on the 14th? A. Yes.

Q. All right now. On the 14th you did report
to work? A. Yes, I did.

(Testimony of Joe Bockwinkel.)

Q. Did you go to work? A. No, I did not.

Q. Did you see any other employees?

A. Yes.

Q. Around the plant?

A. Well, there was John A. Martin, Bill Conrad, Delbert Richards and there could have been more; I don't know.

Q. Were they around there?

A. Yes, they were all there by the office.

Q. Did you talk to Martin and Conrad?

A. Yes.

Q. Now, did you discuss Canadian shingles with them?

A. A little. And they said that they were going up to [138] Mr. Art Brown's and I said that I would wait and see when they came back, and they never came back.

Q. They said they were going up to Art Brown's?

A. Yes.

Q. Now, after the 14th of January you were away on a vacation of some sort, were you?

A. Yes.

Q. You did not come back until about when?

A. Oh, on about, I was gone about, I never left for, it was a week before I left and I was gone about ten days.

Q. Then when you got back from your vacation did you go to see Art Brown?

A. Yes. Rosenbach and I.

Q. You and who else?

A. Rosenbach.

(Testimony of Joe Bockwinkel.)

Q. And what was the purpose of going up to see Mr. Brown?

A. Well, Rosenbach came and said that the company would back us up on fines or whatever the union would levy and we went and saw Art Brown.

Mr. Flood: May I ask that be read again because I did not hear it?

(Answer read.)

The Witness: We asked him if we could go back to work and he said that he could not stop us but that we would be blacklisted or in bad with the union. [139]

Q. All right. Art Brown said that?

A. Yes.

Q. And when you asked him about going back to work, did you tell him at what place?

A. Yes.

Q. What place was it? A. Sound Shingle.

Q. The shake mill at Sound Shingle?

A. Yes.

Q. That is about all of the conversation that you had with Art Brown?

A. Yes. He said that he could get us a job in Seattle.

Q. He said that? A. Yes.

Q. That is about all? A. That is about all.

Q. Do you know if the shake mill has operated since? A. No, it hasn't.

Q. Since January 11th, 1952?

A. No, it has not.

Mr. Constantine: That is all.

(Testimony of Joe Bockwinkel.)

Cross Examination

Q. (By Mr. Flood): That is the first time you ever saw Art Brown, was it not?

A. Oh, I have seen him lots of times but to talk about [140] union, yes.

Q. That was the first time? A. Yes.

Q. The first time you ever talked to him about anything connected with Sound Shingle?

A. As far as Canadian shingles were concerned, yes.

Q. And that was a couple of weeks after the shutdown? A. About three weeks.

Q. Three weeks. You are working there now?

A. Yes.

Mr. Flood: That is all.

Trial Examiner Royster: Are there any further questions?

Miss Krug: I have one question.

Cross Examination

Q. (By Miss Krug): Do you customarily get a newspaper called "The Shingle Weaver"?

A. Yes, I do.

Q. How often do you get it?

A. It comes once a month; If I want to take it, I take it; and if I don't, I don't.

Trial Examiner Royster: You will have to keep your voice up.

Miss Krug: That is all, thank you.

(Witness excused.) [141]

ELWIN ROSENBACH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Your name is Elwin Rosenbach? A. Yes.

Q. And where do you live?

A. Route 1, East Stanwood, Washington.

Q. In Marysville, Washington?

A. East Stanwood, Washington.

Q. Oh, I see. And on January 14th of this year you were employed by what company?

A. By Sound Shingle.

Q. As what? A. Shake seeder.

Q. In the shake mill or in the shingle mill?

A. In the shake mill.

Q. And you remember that on January 11th, 1952, some B.C. shingles came down to the shake mill? A. Yes.

Q. And you were there at the time?

A. Yes.

Q. Were you on the second shift too?

A. Yes. [142]

Q. That starts at what time?

A. At 2:45 p.m.

Q. And finishes about what time?

A. About 9 o'clock p.m.

Q. Now, do you remember about what time the B.C. shingles came in?

(Testimony of Elwin Rosenbach.)

A. It was some time after 4:00 o'clock p.m.

Q. And when they came in what did you do?

A. Well, we opened the car and looked at them.

Q. Who was with you when the car was opened?

A. Jack Butters, Walt Nelson, John A. Martin, and Curley Richards.

Q. And John A. Martin is the shop steward in the shake mill, is he? A. Yes.

Q. All right. Then when what happened when you went with these fellows to the car?

A. Well, we opened the door and pulled out the bundle.

Q. Do you remember who opened the door?

A. I think it was Jack Butters. I am sure it was Jack Butters.

Q. Yes, and then what?

A. We looked at one bundle and saw that they were unfair shingles and put it back and closed the door.

Q. Did anyone say anything? [143]

A. Oh, there was some conversation about them.

Q. Do you remember what the conversation was?

A. I don't remember right now.

Q. Do you recall any of it?

A. No.

Q. Well, what did the men do after they put the unfair shingles back in the car?

A. They went home.

Q. Was that on orders from the company?

(Testimony of Elwin Rosenbach.)

A. No.

Q. They just went home?

A. Yes. Well, we knew we could not work on unfair shingles so there was not much else to do.

Q. All right. Now, after that the next working day would be Monday, January 14th, 1952?

A. Yes.

Q. Did you go back to work on the 14th?

A. I think I went down on the 14th, yes.

Q. Was there any work there?

A. No.

Q. The shake mill was shut down?

A. It was shut down, yes.

Q. Has it opened up since as far as you know?

A. No.

Q. Now, at some time afterwards you went with Joe [144] Bockwinkel to see Art Brown, did you not, about going to work in the shake mill?

A. Yes.

Q. And you just heard Joe Bockwinkel. Is that about what Art Brown said?

A. Well, yes, that is about it.

Q. In your own words can you tell us what he said?

A. Well, he said that he could not stop us from going back to work but that they were unfair shingles and we would be on the blacklist.

Q. You would be on the blacklist if you went back to work?

A. Yes.

(Testimony of Elwin Rosenbach.)

Trial Examiner Royster: You will have to speak up so the official reporter hears you.

Q. (By Mr. Constantine): Did you tell him what place you wanted to go back to work to?

A. Yes.

Q. What place was it? A. Sound Shingle.

Q. The shake mill? A. The shake mill.

Q. You did say that? A. Yes.

Q. At present you are working where?

A. At the Colonial Shake. [145]

Q. That is in Seattle? A. Yes.

Q. And do they work on Canadian shingles down there?

A. They have worked on Canadian shingles, yes.

Q. While you were there? A. Yes.

Q. Did they put the union label on, the A. F. of L. union label on?

Trial Examiner Royster: What difference does it make?

Mr. Constantine: Counsel brought it out; I don't think it makes any difference at all, Mr. Examiner.

Trial Examiner Royster: All right.

Q. (By Mr. Constantine): All right now, against that, that is all.

Trial Examiner Royster: Have you any questions, Miss Krug?

Miss Krug: No, thank you.

Cross Examination

Q. (By Mr. Flood): You are now employed

(Testimony of Elwin Rosenbach.)

elsewhere, are you not? You are not employed by the Sound Shingle?

A. Well, I suppose I would still have my job back when they start up.

Q. How long have you been working where you are now? A. One week.

Q. Have you ever talked to Art Brown before the shingles [146] came in on January 11th?

A. No, sir.

Q. It was some several weeks afterwards that you talked to Art Brown? A. Yes.

Mr. Flood: That is all.

Mr. Constantine: All right. You are excused.

(Witness excused.)

RICHARD FRANK TIDY

A witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Will you please state your full name for the record?

A. Richard Frank Tidy.

Q. And you live where?

A. Marysville, Washington.

Q. And your position?

A. Now superintendent of the Sound Shingle Company.

Q. And that also is in Marysville?

(Testimony of Richard Frank Tidy.)

A. That is right.

Q. I think you were present on January 13th, 1952, when Art Brown and Mr. Uttley came to Sound Shingle, is that right?

A. That is right.

Q. And you heard the statements of Mr. Stuck and Mr. John [147] E. Martin with respect to the short conversation that occurred that day; is that about what transpired?

A. That is just about what happened.

Q. Now, then, after Brown and Uttley left did any other union officials come to the plant on January 13th?

A. There was somebody came to the door about twenty minutes after Mr. John E. Martin, or after Mr. Brown had left and Mr. John E. Martin happened to be at the door and he said, "Oh, it is Mr. Al Sarrett," and he opened the door and invited him in. And I had never seen Albert Sarrett before and Mr. Martin introduced us. There was a short——

Q. Do you remember how he introduced Mr. Sarrett?

A. Well, no I don't right now, but at the time, why, shortly after that I spoke to Mr. Sarrett and he told me he was a field representative and we talked for a couple of minutes about his son. His son worked for me when I was superintendent of the Western Shake and Cedar in Seattle and that is how I happened to, how he happened to stick in my mind.

(Testimony of Richard Frank Tidy.)

Q. Now, was there any talk between Mr. Sarrett and anybody else in the office on January 13th?

A. Yes. There was a couple of questions brought up about the union clauses and Mr. Sarrett said that he would go out and get somebody that knew more about it, about the union contract than what he did so he went out and brought in a [148] gentleman by the name of Fred Baker, a gentleman that he introduced as Fred Baker from Wheeler, Oregon, a representative of the Wheeler, Oregon, local as I understand it and had been with Mr. Sarrett up at the delegation meeting or convention at Bellingham.

Q. So they brought Mr. Baker in?

A. That is right.

Q. Was there any talk among the people there after Baker came in?

A. Yes, quite a bit. They started to talk about this agreement and Mr. Martin asked Baker what he——

Q. What agreement are you referring to?

A. This one here, this 1951 agreement.

Q. That is respondent's Exhibit No. 4?

A. That is right.

Q. All right.

A. We had two of them open on the desk and we were referring to them back and forth and then Mr. Martin put his down and he said, "Well, on this deal that we have here why is it that you are allowing them to run Canadian shingles down in Seattle and you are not going to let us run them

(Testimony of Richard Frank Tidy.)

here?" and Mr. Baker said, "Well, I did not know that they are," and I spoke up at the time and I said, "Yes, that I had been in Seattle and working in Seattle and I knew four definite plants that were running this week on them." And Mr. Martin said that he had [149] been and saw them running and he specifically mentioned Color Shake. With that Mr.——

Trial Examiner Royster: Let me interrupt here for a minute. Is this witness going to testify to the same thing that Mr. Martin and Mr. Stuck testified?

Mr. Constantine: As Mr. Martin and as Mr. Stuck testified.

Trial Examiner Royster: It is cumulative.

Mr. Constantine: All right, sir.

Trial Examiner Royster: I will excuse the witness from the necessity of going over all this again until such a time where it might appear that there is some dispute as to what happened.

Mr. Constantine: All right, very well. You may step down.

Trial Examiner Royster: Do you care to examine him on what he has already said?

Mr. Flood: No examination.

Trial Examiner Royster: All right, the witness is excused.

(Witness excused.)

Mr. Constantine: I would like to have the next witness sworn and he, too, will be cumulative, Mr. Examiner.

Trial Examiner Royster: All right. I do not see any point in going over this story again and again. [150]

Mr. Constantine: All right. I will call Mr. Frank S. Barker.

FRANK S. BARKER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Constantine): Will you state your full name for the record please?

A. Frank S. Barker.

Q. What is your address?

A. Route 1, Chagrin Falls, Ohio.

Q. You are a partner with Mr. Martin in the Sound Shingle Company? A. Yes, sir.

Q. And you were present at which conversations between the Sound Shingle officials and the union officials?

A. On Sunday, January 13th, 1952.

Q. That is, there were two groups there that you would testify to, the first group was Brown and Uttley who came in for a short while?

A. Yes, sir.

Q. And the second group was Sarrett who was shortly followed by Mr. Baker? A. Yes, sir.

Q. And you have heard Mr. Stuck's and Mr. Martin's [151] testimony with respect to those meet-

(Testimony of Frank S. Barker.)

ings and if you were to testify you would say about the same thing? A. I would.

Q. Now, on January 11th, 1952 your shake mill closed down on account of a work stoppage there?

A. Yes, sir.

Q. Is that work stoppage still on?

A. Yes, sir.

Q. All right. So that at present your mill is not operating? A. That is right.

Q. The shake mill?

A. The shake mill is not operating.

The reason it is not operating is on account of that work stoppage? A. That is right.

Mr. Constantine: I have no more questions.

Trial Examiner Royster: Are there any questions of this witness?

Mr. Flood: Well, I would like to ask him a question but it may not be proper cross examination.

Trial Examiner Royster: Go ahead.

Cross Examination

Q. (By Mr. Flood): How much time do you spend at the Marysville operation? [152] Not very much? A. Not very much.

Q. You have a substantial interest in the Perma Products Company in their plant in Chehalis, Washington, have you not?

Mr. Constantine: Objection.

Miss Krug: Objection.

Trial Examiner Royster: Sustained.

(Testimony of Frank S. Barker.)

Q. (By Mr. Flood): You do not spend a great deal of your time in Washington, do you?

A. It depends on what you mean by a great deal of my time. Do you want to be specific?

Q. Yes; let us know how much.

A. Approximately one half .

Q. One half of a year do you mean?

A. Half of the time, half of the month.

Mr. Flood: That is all.

Re-direct Examination

Q. (By Mr. Constantine): Half of the month; how often, every month?

A. Every month; it varies.

Mr. Constantine: That is all.

Trial Examiner Royster: You are excused.

(Witness excused.)

Mr. Constantine: The General Counsel will rest,
Mr. Examiner. [153]

Trial Examiner Royster: All right.

Mr. Flood: Will your Honor give us just a moment's recess?

Trial Examiner Royster: Surely. Let's take a five minute recess.

(Short recess.)

Trial Examiner Royster: On the record.

Mr. Flood: Respondents will at this time move to dismiss the complaint, upon the ground first that the complaint itself states no grounds upon which a violation of the Act 8(4)(b)(a) could be established and secondly upon the ground that the evi-

dence produced by the complainant fails to establish a violation of 8(4)(b)(a).

Trial Examiner Royster: Well, the complaint of course is drawn almost in the language of the section. And it does appear that there has been a work stoppage here and there certainly is evidence which could support a finding, it seems to me that the purpose of the stoppage was to persuade Sound Shingle to cease doing business with a Canadian manufacturer or processor of shingles.

Mr. Ward: With whom, sir, the respondents had no quarrel whatsoever on a secondary boycott.

The dispute so far has been with Sound Shingle, the primary employer.

There has been no evidence here that either of the [154] respondents have attempted to organize North Shore. There has been no evidence of a quarrel with North Shore and the employees of the primary employer.

There is a dispute which centered right here with Sound Shingle.

Your element of a secondary boycott is missing within the language of the allegations of the complaint.

All boycotts are not unlawful. A primary boycott, which this appears to be so far at this state of the record, there has been no attempt to show that North Shore has been a party to any disputes with respondents. And respondents have not attempted to organize their employees.

So far as we are concerned North Shore is a

total stranger in so far as the respondents are concerned.

Trial Examiner Royster: The evidence is, however, that the shingles that arrived at the plant on January 11th were shingles of North Shore and that they came to the Sound plant for processing.

It was a product of North Shore that came to the plant as I understand the evidence.

Mr. Flood: That, however, was merely per accident, incidental. The union itself knew nothing about it at the time that that happened. The union was not a party to it. It was an arrangement for the convenience of North Shore and Sound Shingle to which the union was not privy or a party. [155]

Trial Examiner Royster: You mean as far as the property in the shingles is concerned?

Mr. Flood: As far as the property is concerned.

It does have some far reaching effects which will be dealt upon at some length in this case but for the moment I don't think we care to discuss that phrase of it, do we?

Mr. Ward: No.

Mr. Flood: But I do want to call the Examiner's attention to just the skeletal ground upon which we rely. The Act provides in Section II, Paragraph 6, or rather Paragraph 9 that a term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining tenure or seeking to arrange terms or conditions of employment.

Now, if there is a labor dispute here, that labor

dispute lies immediately and directly between the union and the Sound Shingle and no one else. Some inchoate, anomalous party in Canada, of whom we had no notice, or no knowledge whatsoever is no party here at all to this dispute.

And then when we transpose that into the terms of Section 8(4)(b)(a) we, if we are seeking to do anything here whatsoever, we are seeking to induce or encourage not the employees of Sound Shingle of whom we know nothing about or North Shore rather, of whom we have no knowledge whatsoever [156] but we are seeking to, we are charged with seeking to induce or encourage the employees of Sound Shingle where the object is to do what? "To force or require Sound Shingle—no other person—from using the products of some other manufacturer."

Now, we don't know who any other manufacturer in this case happens to be, but we do say this, to constitute a charge of secondary boycott under the act it is now well established that the boycott in question must be a secondary boycott; it must be a boycott where there are more than one employer. In this case the only employer of any employees who have a dispute here are the employees of the Sound Shingle and the local union. Since there is an entire absence of a secondary employer there is an entire absence of an essential element to constitute an unfair labor practice.

I am not going to argue this question any farther but I think that the point that we raised is far reaching.

Trial Examiner Royster: Well, certainly I will

consider the point that you raised and give it serious thought but I will deny the motion at this time.

Miss Krug: Mr. Examiner, may I ask leave at this time for permission to submit a brief of the question of whether or not the acts charged constitute a secondary boycott?

Trial Examiner Royster: Yes.

Miss Krugg: Since you have indicated that you would entertain the motion at a later time I would like now for the [157] record to obtain leave to file a brief on that point.

Trial Examiner Royster: All right. Well, now when we come to the close of the hearing we can set the time within which to file briefs.

Miss Krug: That is fine.

Trial Examiner Royster: Are you going to proceed with evidence, Mr. Flood?

Mr. Flood: Yes.

Mr. Martin, may I ask you just a few questions?

JOHN E. MARTIN

a witness previously sworn testified as follows:

Direct Examination

Q. (By Mr. Flood): You have previously been sworn? A. Yes.

Mr. Constantine: I take it that now Mr. Martin is Mr. Flood's witness?

Mr. Flood: Why, of course. Not a friendly witness I may say.

Trial Examiner Royster: Of course, I will not forget the relationship between the parties in respect to the examination. All right.

(Testimony of John E. Martin.)

Q. (By Mr. Flood): Mr. Martin, when is the contract that you have with North Shore terminable?

A. Well, for at least a year. We agreed to go into it for at least a year and then at the end of another year we are [158] going to talk about it.

Q. It is an oral contract for at least a year?

A. Yes.

Mr. Flood: That is all.

Trial Examiner Royster: All right. Are there any question of Mr. Martin?

Mr. Constantine: No. None from the General Counsel.

Trial Examiner Royster: That is all, Mr. Martin.

(Witness excused.)

Mr. Flood: Now I will call Mr. John A. Martin.

JOHN A. MARTIN

a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Flood): What is your name, Mr. Martin? A. John A. Martin.

Q. Where do you live?

A. Marysville, Washington, 310 Alder Street, Marysville, Washington.

Q. How long have you lived there?

A. Nine years.

(Testimony of John A. Martin.)

Q. What is your employment?

A. I am a shingle packer.

Q. Where are you employed now?

A. At the Jamison Shingle Company. [159]

Q. How long have you been employed at Jamison's.

A. Well, I worked there two weeks and then the mill broke down. We have been down about four weeks I guess; it would have been about six weeks.

Q. Is that at Everett?

A. This is at Everett, yes.

Q. How long have you been engaged in shingle weaving operation?

A. On and off for thirty-five years.

Q. Have you been employed at the plant that is now owned by the Sound Shingle Company?

A. Yes.

Q. How long have you been employed there?

A. Oh, approximately two years.

Q. And what is your employment?

A. Shingle and shake packer.

Q. Are you a member of local 2580?

A. Yes, sir.

Q. How long have you been a member of local 2580? A. Since 1937.

Q. When you were employed by the Sound Shingle Company were you, or did you have any function on behalf of the local for the employees at the plant?

A. Well, I was steward about the last six months.

(Testimony of John A. Martin.)

Q. As steward did you have anything to do with the handling [160] of the union label, the brotherhood's label?

A. Well, as a packer I did.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 5 for identification.)

Q. Showing you our Exhibit No. 5 for identification and examining that, can you tell me what that is? Do you know what that means?

A. This is our union stamp. That goes on the bundles, on every bunch.

Q. That is your union stamp that bears your union label? A. That is right.

Q. Granite Falls Shingle Company, of course, do you know what that is? A. Yes.

Q. Do you know where that is? A. Yes.

Q. That is nearby? A. Yes.

Q. Does this information appear on all union stamps or just the part below here?

A. That is right.

Q. Just the part below? A. Yes.

Mr. Flood: Then I am willing to seal off the Granite [161] Falls part and offer merely the union's stamp.

Mr. Constantine: Do you offer them now?

Mr. Flood: I offer this one now, yes.

Mr. Constantine: That is Respondent's Exhibit No. 5?

Mr. Flood: Yes.

Mr. Constantine: I object, Mr. Examiner.

(Testimony of John A. Martin.)

Trial Examiner Royster: What purpose is the exhibit to serve in evidence? How does it tie in with your defense?

Mr. Flood: It is just a part of the practice of the union in administering its union stamp.

Trial Examiner Royster: Well, I understand that but how does the use of the union stamp constitute a part of your defense to the allegations of the complaint?

Mr. Flood: Of course, it is very clear in our position that the union here is confronted with the question of its right to protect itself against using products that do not bear the union stamp.

Trial Examiner Royster: Well, these products that came in we will assume did not bear the union stamp, the B. C. shingles.

Mr. Flood: That I think has already appeared from the evidence.

Trial Examiner Royster: I think so.

Mr. Flood: And we simply offer this exhibit for the purpose of showing the great care and the elaborate [162] machinery that the union has set up to make sure that its services are rendered only in connection with its own label.

Trial Examiner Royster: I do not understand it. I understand what you are saying, of course, but I don't see where it fits into the pattern of the case in any respect.

I will sustain the objection and that may go into the rejected file.

(The document heretofore marked respond-

(Testimony of John A. Martin.)

ent's Exhibit No. 5 for identification, was rejected in evidence.)

[See page 63 of this printed Record.]

Mr. Flood: I will also ask the official reporter to kindly mark Respondent's Exhibit No. 6.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 6 for identification.)

Mr. Flood: And the same ruling with respect to Exhibit No. 6?

Trial Examiner Royster: Well, I don't know what Exhibit No. 6 is.

Mr. Constantine: That is apparently a smaller copy of the same union label and I object to that.

Trial Examiner Royster: All right. It may too go into the rejected file.

(The document heretofore marked Respondent's Exhibit No. 6 for identification, was rejected in evidence.)

[See page 64 of this printed Record.] [163]

Q. (By Mr. Flood): How long have you been a packer at the Sound Shingle?

A. Oh, approximately two years.

Q. And during that time what have you done with regard to the affixing of the union labels to shingle products?

A. Well, we put them on or we put a label on every bunch or a stamp.

Q. Now what is the difference between a label and a stamp?

(Testimony of John A. Martin.)

A. Well, a label is a paper and a stamp, a rubber stamp we stamp on.

Q. A label is used in the case of products that are shipped under certigrade, do you?

A. Yes, that is right, with the company's name on it.

Q. With the company's name on it. And the stamp is used in the case that they are shipped without any trade name? A. That is right.

Q. During the period of the two years that you were in charge of the stamp on your shift, was it just on your own shift? A. That is right.

Q. And who was in charge of the stamp on the other shifts?

A. Well, the packers on the other shifts.

Q. Do you know of any shingle products that were manufactured and shipped from Sound Shingle that did not bear the union label? [164]

Miss Krug: Object.

Mr. Constantine: I join in the objection.

Trial Examiner Royster: All right. I will sustain the objection.

Mr. Flood: I think that I should be enlightened as to the grounds of the objection.

Miss Krug: I object on the ground that it is immaterial.

Trial Examiner Royster: Well, that certainly would seem to be so.

Mr. Flood: It seems to me that if the unions have a consistent and invariable practice of working only on products to which the union label is at-

(Testimony of John A. Martin.)

tached, or conversely, that on all products that they do process they require the attachment of the union label, that is relevant evidence.

Trial Examiner Royster: Well, it is not necessary to go through all of this elaboration. Is it a fact that the union refused to work on the shingles, the B. C. shingles because there was no union label on them?

Mr. Flood: That over-simplifies it. It is a fact that certain union members did so.

Trial Examiner Royster: Well, the fact that they invariably used a union label at the Sound mill before that time does not seem to me to have any bearing on it, material bearing. [165]

Q. (By Mr. Flood): Your position as a shop steward is appointive and not elective, is it?

A. That is right.

Q. And your appointment is right there at the shop, is it not?

A. In that one place, yes.

Q. Did anybody ever order you not to work on that carload of shingles that arrived January 11th?

A. No, sir.

Q. Why did you go home rather than work, rather than to work on them?

Mr. Constantine: I object.

Trial Examiner Royster: Overruled. You may answer.

The Witness: Well, that was always the understanding with us that we would not work on unfair products.

(Testimony of John A. Martin.)

Q. (By Mr. Flood): Did Art Brown ever talk to you about working or not working on those shingles?

A. I had not seen Art Brown to talk to him about those shingles until he came in.

Q. Until after the stoppage had occurred?

A. That is right.

Mr. Flood: That is all; you may examine.

Cross Examination

Q. (By Mr. Constantine): You are a shop steward in the shake mill? [166]

A. That is right.

Q. And Bill Conrad is in the shingle mill?

A. That is right.

Q. At the Sound Shingle? A. Yes.

Q. And on January 11th, 1952, you were shop steward for local 2580 at the shake mill?

A. Yes.

Q. Do you remember a carload of B. C. shingles that came in in late 1950, Mr. Martin, to the Sound Shingle Company which at that time was not owned by Mr. Martin and Mr. Barker?

A. That is right.

Mr. Flood: A carload in what year?

Mr. Constantine: Late in 1950.

The Witness: Yes, I was there.

Q. (By Mr. Constantine): And you had some talk with Art Brown about working on those?

A. I never did, no.

(Testimony of John A. Martin.)

Q. All right. Do you remember that you made an affidavit to Mr. Hilburn, Mr. Martin?

A. Yes, sir.

Q. Were you telling him the truth do you think at the time that you made the affidavit——

Mr. Flood: I object to the form of the question.

Trial Examiner Royster: Overruled. You may answer. [167]

The Witness: I thinked I was.

Q. (By Mr. Constantine): You thought you were.

And your memory was fairly good at that time?

A. It should have been.

Q. And I would like to ask you this, to show you this affidavit which is signed by you and sworn to before Mr. Hilburn, the Field Examiner for the National Labor Relations Board. A. Yes.

Q. And this affidavit says, “I, John A. Martin was working for Sound Shingle Company in late 1950 before the present owners took over when they got a car of Canadian shingles in and we got special permission from Art Brown to run them. At this time Art Brown told us that we could run the one car but the next car that came in the men were not supposed to touch them.”

Do you remember that in the affidavit?

A. He never told me, though, because I had not talked to him.

Q. I understand that.

That is in the affidavit, is it not?

A. I guess it is.

(Testimony of John A. Martin.)

Q. Well, I want you to look at it and see if it is.

A. Yes. Well, Art Brown never told me that because I had not seen Art. [168]

Q. You can answer my question.

Is it in there, in the affidavit?

A. Yes, absolutely it is.

Q. And is that your signature to the affidavit?

A. That is right.

Q. And did you swear to that affidavit before Mr. Hilbun?

Did he swear you? A. I don't know.

Q. You don't know if he swore you?

A. No, he did not.

Q. He did not swear you in to it? A. No.

Q. Do you mean this statement here, "sworn to before me this eleventh day——"

A. I just signed it.

Q. He did not swear you in on it? A. No.

Q. Now, you were in my office around April 1st or April 2, thereabouts, weren't you, when I was here? A. That is right.

Q. And do you recall you told me that that was true when I asked you about that affidavit?

A. I don't remember that.

Q. Well, do you recall you told me that you would like to sign another affidavit like it but the union would not let [169] you?

Do you deny that you made that statement?

A. I said I would not sign one.

Q. You also said you had talked to the union about it. A. I had.

(Testimony of John A. Martin.)

Q. Do you remember making that statement?

A. No, I don't know.

Q. And you have talked to the union since then, haven't you? A. Sure.

Q. And you have brought boys down from the mill, haven't you?

A. I haven't, no. I have come down with them.

Q. You have come down with them to the union office? A. That is right.

Q. Were you present when Mr. Bockwinkel and Mr. Nelson and Rosie went to the union office?

A. I might have been. I must have been.

Q. Last week or this week, I don't recall when?

A. That is right.

Q. And the boys were told to change their story that they had in their affidavits, weren't they?

A. I never heard it.

Q. You were not there when they were told that?

A. No. [170]

Q. All right. But they were brought to the union office, weren't they? A. Yes, sir.

Q. And they were asked about their affidavits that they had given here?

A. I don't remember whether they was or not asked about them.

Q. It was just last week. Can't you remember what happened last week?

A. I can but I believe they read them to them.

Q. Read what?

A. Their affidavits what they wrote.

(Testimony of John A. Martin.)

Q. The unions had a copy of these affidavits that I have? A. Well, I don't know.

Mr. Constantine: All right. I have no more questions.

Miss Krug: I have one question.

Trial Examiner Royster: All right.

Cross Examination

Q. (By Miss Krug): You stated I believe on direct examination, Mr. Martin, that you had an understanding that you, you were not to work on unfair shingles? A. That is right.

Q. With whom did you have that understanding?

A. Well, we had it for years. I don't—we have always had that. We haven't—I don't believe direct from any union. [171]

Q. When you say "we" who are you including in that?

A. That includes all union members.

Q. And was it you that decided that these Canadian shingles were unfair?

A. That is right.

Q. And what was the basis for that decision?

A. Well, they did not have the union label on them.

Miss Krug: No more questions.

Trial Examiner Royster: Is there anything further?

Mr. Flood: Yes.

(Testimony of John A. Martin.)

Redirect Examination

Q. (By Mr. Flood): You were in my office, were you not? A. That is right.

Q. Yesterday. And you told me, did you not, that you had made some affidavit, you had signed some affidavit for the board that they did not give you a copy of and you did not know what was in it?

A. Yes, that was the first one.

Q. And I did not ask you to sign any statement whatsoever, did I? A. No, sir.

Q. Now tell the court exactly what I told you with respect to what you should say when you testified here.

You were subpoenaed, were you not by the company, by the Government? [172]

A. That is right.

Q. You told me that you were subpoenaed.

A. Yes, sir.

Q. And what did I tell you about your testimony? A. You told me to tell the truth.

Q. Exactly, did I not? A. Yes.

Q. And the same thing to Mr. Rosenback and to Mr. Bockwinkel? A. Yes.

Q. What have you done with your subpoena?

A. I have it.

Mr. Flood: That is all.

Mr. Constantine: Wait a minute.

Recross Examination

Q. (By Mr. Constantine): You came to my

(Testimony of John A. Martin.)

office around the first of the month too, didn't you?

I don't mean the exact date; you did come in?

A. Yes, well yes.

Q. Do you recall what I told you?

Did I ask you to tell the truth too?

Mr. Flood: I think that that is improper.

Mr. Constantine: This is cross examination.

Mr. Flood: May I be heard?

Trial Examiner Royster: Yes. [173]

Mr. Flood: I did not make the slightest reflection on anything that counsel may have advised this witness but he was unkind enough to intimate and in fact to directly declare that I advised this witness to change his story and I want the record to be very clear about that that I definitely challenge it.

Trial Examiner Royster: I will sustain the objection.

Is there anything further?

Mr. Constantine: That is all.

Trial Examiner Royster: You are excused, Mr. Martin.

(Witness excused.)

Mr. Flood: I will call Mr. Art Brown.

Your Honor, we had assumed that this would be, or rather that the board's case would be much longer than it has been and in fact we asked that, or rather we inquired yesterday and we were told that it would take two days and I may state to you that we are not prepared to proceed at this time and that we would like to ask that this be recessed until tomorrow morning.

That is without any idea of delaying the outcome of the case because I believe that it could very easily be dispatched within tomorrow's court day.

Mr. Constantine: May I ask this, Mr. Examiner, I am not in opposition to this. I would like to ask about how long Mr. Brown, or rather Mr. Flood's case will take. [174]

Trial Examiner Royster: Well, maybe Mr. Flood can tell us.

Mr. Flood: I should not want to commit myself too irrevocably on that but I don't think that it will take more than half a day.

Trial Examiner Royster: Do you think likely that we can finish tomorrow morning?

Mr. Flood: Yes.

Trial Examiner Royster: All right. Is that agreeable with you Miss Krug?

Miss Krug: Yes.

Trial Examiner Royster: Is 9:30 a.m. an agreeable hour?

Mr. Flood: It is with us.

Trial Examiner Royster: All right. At this time we will recess until 9:30 o'clock tomorrow morning.

(Whereupon, at 3:00 o'clock p.m., Thursday, April 24th, 1952, the hearing was adjourned until tomorrow, Friday, April 25, 1952, at 9:30 o'clock a.m. [175])

Trial Examiner Royster: On the record. Now, we had just sworn Mr. Brown in yesterday afternoon when we recessed. Do you want to resume with him or start with him?

Mr. Flood: I would like to interrupt for a moment and call another witness.

Trial Examiner Royster: All right.

Mr. Flood: I will call Mr. Martin.

JOHN E. MARTIN

previously sworn, testified as follows:

Re-Direct Examination

(By Mr. Flood): Mr. Martin, I want to inquire briefly about the car of shingles that was on your spur there from January 11th, 1952, for a couple of weeks. You shipped that and I understood you to say that you sold it to the Perma Products Company at Chehalis, Washington?

A. That is right.

Q. They paid you for it? A. Pardon me.

Q. Perma Products paid you for it?

A. Yes, sir. After the car had set there we finally paid North Shore for it to get them off the book.

Q. You bought the car from North Shore and then you sold it to Perma Products?[179]

A. Yes, after February when the boys refused to run it, then we bought the car from North Shore and paid them and re-sold it to Perma Products.

Mr. Flood: That is all the questions that I have.

Mr. Constantine: I have a question.

Re-Cross Examination

Q. (By Mr. Constantine.: Was there anything in the contract between Sound Shingle and North

(Testimony of John E. Martin)

Shore as to whether any labels would be attached to the North Shore grooved shingles?

A. No. No, the only specification was that North Shore's labels would go on. They were shipped out in the name of North Shore Shingle Company and they were going to furnish us a supply of their own labels, what they called "Norshore" Brand.

Q. And the contract provided that you were to apply those labels to the North Shore Shingles?

A. Yes. Our name would not appear in the picture at all because they did not even want their customers to know who was doing this work for them or where the shingles were coming from.

Q. That is you shipped them direct to their customers?

A. The whole appearance would be as though they were coming direct from the North Shore Shingle Company.

Q. So that the bill of lading also was with the North Shore's named as the consignor. [180]

A. Would be made out showing the North Shore Company as shipper and our name would not appear in the picture at all.

Mr. Constantine: All right. I have no more questions.

Trial Examiner Royster: Are there any further questions of the witness?

Mr. Flood: Yes.

Re-Direct Examination (Cont.)

Q. (By Mr. Flood): Do you have available the North Shore labels?

(Testimony of John E. Martin)

A. I think we have. I am not sure if we have any yet or not.

Q. Will you produce them please?

A. Do you mean right now?

Q. How long will it take? Could you telephone your Marysville office and have them here this afternoon?

A. I don't know; I won't say for sure. I did not say for sure. I said I don't know whether we have them on hand but that was the agreement.

Mr. Flood: Then, Mr. Examiner, I ask for the issuance of a subpoena duces tecum to produce such North Shore labels.

Miss Krug: If the court please, I object to the issuance of any subpoena unless the witness can make certain that he has in his possession the matter about these subpoenas.

Mr. Flood: I asked for the subpoena duces tecum and [181] then the witness can make such return to that subpoena as he can.

Trial Examiner Royster: Well, I will have to give you a subpoena on application; so, are you through with the witness otherwise?

Mr. Flood: Yes. Pardon me; just a minute. He will be available upon the return to the subpoena, will he not?

Trial Examiner Royster: I do not know. I will give you the subpoena and then it is up to you to handle it.

Mr. Flood: That is all until the subpoena is issued.

(Testimony of John E. Martin)

Mr. Constantine: All right, you may step down, Mr. Martin.

Trial Examiner Royster: Off the record.

(Discussion off the record)

Trial Examiner Royster: On the record.

Q. (Mr. Flood): It was a part of your plan, was it, to have your employees in the Sound Shingle attach North Shore labels to your bundles when they were shipped?

A. Not necessarily. There were already two cars of shingles shipped under this agreement, but we shipped them from our plant to another plant for staining, at which time the North Shore label was attached, and for your information——

Mr. Flood: I object to volunteer testimony.

Trial Examiner Royster: All right. [182] Are there any further questions?

Mr. Flood: Yes.

Q. (By Mr. Flood): Those two cars, they were not shipped to Sound Shingle, were they?

A. No. No, we used our own shingles up there to groove. We grooved them and we re-shipped them to the staining plant for North Shore and North Shore were to replace those two cars. It was a matter of convenience that they wanted the orders out before their cars could arrive at our mill for grooving.

Q. So you used your own shingles?

A. We used our own shingles as an expediency to expedite the shipment.

(Testimony of John E. Martin)

Q. That were manufactured in your own shingle mills?

A. That is right, Well, now wait pardon me. They may not have been manufactured in our own shingle mill. They may have been shingles that we purchased from local American mills because at that time we were purchasing quite a few.

Q. That was before the shingle mill shut down?

A. No, no, no. This was in January, I believe, either the latter part of December or the early part of January; no, it was the latter part of December. We made this agreement the 1st of December, around the 1st of December and then some time during December they wanted these two orders shipped quick and they said to go ahead and use your own [183] shingles and we will replace them.

Q. Those two orders, however, bore the union label, did they not?

A. Well, that I do not know but I do know definitely that when they left the staining plant they did not because that staining plant does not use the union label.

Q. Well, you have no staining plant?

A. No, sir. I am talking about the staining plant that we shipped them to for North Shore.

Q. But when they left your shop, when they left your plant, they had the union label?

A. Well, that I would not know because I did not see them.

Q. Well, they were manufactured under the con-

(Testimony of John E. Martin)

ditions under which they were entitled to the union label, weren't they?

A. Well, I presume so; there was never any discussion about union label so far as I was concerned.

Mr. Flood: That is all.

Mr. Constantine: All right.

Trial Examiner Royster: You are excused.

(Witness excused)

Mr. Flood: Now, did you want to go off the record?

Trial Examiner Royster: All right, we will go off the record, and I will give you your subpoena.

(Off the record.)

(Discussion off the record.) [184]

Trial Examiner Royster: On the record.

Mr. Constantine: Mr. Examiner, General Counsel moves to quash the subpoena No. B-15814 signed by John M. Houston, a member of the National Labor Relations Board and addressed to Mr. John E. Martin.

The subpoena requests that Mr. John E. Martin produce all of the documents, invoices, shipping records, and labels, pertaining to the processing and shipping operations with respect to the car load of shingles received from North Shore Shingle Company Ltd. on or about January 14th, 1952. And any and/all labels of North Shore used or to be used in connection with the transaction herein referred to.

I have no objections to an honoring of the subpoena with respect to one or two labels of North Shore but I think it is unreasonable to request that

(Testimony of John E. Martin)

all of the labels which may amount to quite a few be brought in. And I also object on the ground that so far as I can make out it is not material to any issues now before your Honor.

Trial Examiner Royster: Well, I have some doubt to your standing to move to quash that subpoena.

Mr. Ward: So have I, your Honor.

Miss Krug: If the court please I should like to move on behalf of the company to quash the subpoena, if General Counsel has concluded.

Mr. Ward: I believe that you have to take the proper [185] procedure to do that. I do not think that this is the place.

Trial Examiner Royster: Well, this is the place all right.

Miss Krug: Does your Honor wish to hear me in support of my motion at this time?

Trial Examiner Royster: Well, yes. Go ahead.

Miss Krug: I would like to move to quash the subpoena because it shows upon its face that the matter there subpoenaed is immaterial to any of the issues pending before this Board.

Moreover, the use of the word "all" in a subpoena places an unreasonable burden on the witness to be certain that he does or does not have all documents. since the subpoena is completely unlimited.

The subpoena is more in the nature of a fishing expedition than to elicit any evidence which could possibly be material to any issue, and again from a

purely practical standpoint I would like to object to being required to bring all labels.

The company will be glad to furnish a sample of whatever labels were to be placed upon, but to bring in what I assume would amount to several cartons or sets of identical samples is, I believe, an unreasonable burden to place on the company.

The principal basis for the objection is that there has [186] been no testimony here pertaining to anything but labels and that any documents, invoices, and shipping records pertaining to this carload of shingles is absolutely immaterial to the issue which is raised here or which could become material here.

Mr. Constantine: In view of what counsel has said I do not think it is necessary for you to pass upon my standing and I will withdraw my motion.

Trial Examiner Royster: All right. I do not understand how the matter sought to be produced in this fashion relates to the matter under investigation, to use the language in our rolls.

Now, how are these labels of any importance to the defense in this case?

Mr. Flood: Again I say I do not like to disclose why. There is something peculiarly significant about them.

Trial Examiner Royster: How could it become important?

Mr. Flood: I am trying to think how I might answer that in general language without disclosing to the witness before he is called upon to testify with respect to them the purpose behind our inquiry.

I am rather surprised that the Trial Examiner has not seized the significance of it, but it is very significant to us in connection with the constitution and by-laws of the United Brotherhood, the Oregon-Washington District Council, [187] and the local union, and the contract here in general.

Trial Examiner Royster: Well——

Mr. Flood (interposing): With respect to the union label.

Trial Examiner Royster: Yes, I can understand that the union could very well object to its label being affixed to any produce and products which had not been produced by union labor, but there has not been any evidence that such was the situation here or that that impelled whatever action the union or its members took, not the slightest bit.

Mr. Flood: Well, your Honor is anticipating exactly the evidence that we think will be disclosed by this method, and you are also, I think, disclosing to the adverse party the purpose that we have in mind.

Trial Examiner Royster: Well, I think that on a motion to revoke in this situation you are just about forced to that situation.

If you want to go ahead with your evidence I will withhold a ruling on the petition to quash temporarily. Maybe the importance of this will appear later. It does not appear now.

Mr. Flood: Well, and what is the effect of the subpoena at this time?

Trial Examiner Royster: The subpoena is in effect.

Mr. Flood: All right, we are ready to go ahead.

Miss Krug: If the court please, then by withholding, as I understand it, you are reserving a ruling on the motion to quash the subpoena?

Trial Examiner Royster: That is right.

Miss Krug: And you are reserving your ruling on that with reference not only to the labels but also to the invoices and shipping record, because I suggest that even on the basis of what counsel has stated thus far the materiality of any invoices and shipping records is certainly far beyond the issues in this case and would require gathering documents from other cities than Seattle, and so forth, in order to comply with it.

Trial Examiner Royster: So that you could not comply anyway by 2:00 o'clock p.m. this afternoon?

Miss Krug: Certainly not.

Well, if the court please, the shipping documents and invoices are in Marysville, aren't they, Mr. Martin?

Mr. Martin: The invoices, if they mean on the inbound are, yes, on the inbound shipment.

Miss Krug: So I think it would be rather difficult to produce all of the documents, invoices and shipping records by 2:00 o'clock this afternoon.

Trial Examiner Royster: All right, then you need not produce them by 2:00 o'clock this afternoon. If I rule that they must be produced, if the subpoena [189] is to be enforced I will give you an extension of time to bring that matter in, that material in.

Miss Krug: Thank you.

Mr. Flood: Your Honor, in connection with your ruling, if you are called upon to rule any further upon this matter, your Honor has in mind the rule of the Supreme Court of the United States of America in Taylor vs. Hickman?

Trial Examiner Royster: Yes, I have.

Mr. Flood: Which I think distinctly authorizes an inquiry of this scope.

Trial Examiner Royster: I would think to the contrary.

Mr. Flood: I think all that case bars is our inquiring into the mind of adverse counsel. We could even subpoena their files, which might be embarrassing and we will not do that.

Trial Examiner Royster: I do not think that Taylor vs. Hickman would stand for that proposition, but at any rate go ahead.

Mr. Constantine: I will turn over my files to you. There is nothing embarrassing in my files that I am ashamed of, Mr. Examiner.

Mr. Flood: Then we are ready to proceed?

Trial Examiner Royster: Yes.

Mr. Flood: I will call Mr. Brown. [190]

ARTHUR BROWN

a witness previously sworn testified as follows:

Direct Examination

Q. (By Mr. Flood): You were sworn yesterday, Mr. Brown? A. Yes.

Q. Where do you live, Mr. Brown?

A. 1417 - 8th Street, Marysville, Washington.

(Testimony of Arthur Brown)

Q. How long have you lived in Marysville?

A. Since 1912.

Q. Have you been engaged in the business or trade of a shingle weaver? A. That is right.

Q. For how long?

A. About thirteen years.

Q. Are you a member of the Washington-Oregon Shingle Weavers District Council?

A. I am.

Q. And of what local of that council?

A. Local 2580.

Q. And that is affiliated with the International—

A. (interposing) Brotherhood of Carpenters and Joiners of America.

Q. The A. F. of L.?

A. Yes, the A. F. of L.

Q. What position do you hold with the District Council?

A. I am President of the Washington-Oregon Shingle [191] Weavers District Council.

Q. How long have you served as President?

A. Thirteen years.

Q. The District Council embraces what territory?

A. Washington, Oregon, Idaho, Montana and California.

Q. With how many shingle operations in that area do you have collective bargaining contracts?

A. Well, right around 400 mills.

Q. How many shingle operations, if you know, are there within the area who do not hold collective bargaining contracts with your organization?

(Testimony of Arthur Brown)

A. No shingle mills to my knowledge, but one shake and staining operation.

Q. That is where?

A. Perma Stain in Chehalis, Washington. We also have one staining plant that comes under the A. F. of L. but not under the jurisdiction of the Shingle Weavers' District Council.

Q. That is some other local?

A. That is right.

Mr. Flood: I will ask the official court reporter to please mark this document as Respondent's Exhibit No. 7.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 7 for identification.)

Mr. Flood: And I would also like to have the official reporter kindly mark this document as Respondent's Exhibit No. 8. [192]

(Thereupon the document above referred to was marked Respondent's Exhibit No. 8 for identification.)

Q. (By Mr. Flood): Showing you Respondent's Exhibit No. 7, what is that, Mr. Brown?

A. The Brotherhood of Carpenters and Joiners of America, constitution and by-laws. Dated January 1st, 1951.

Q. Showing you Respondent's Exhibit No. 8, what is that?

A. This is the constitution and by-laws of Washington-Oregon Shingle Weavers' District Council approved as amended January, 1951.

(Testimony of Arthur Brown)

Mr. Flood: I move their admission in evidence.

Mr. Constantine: I object, your Honor.

Miss Krug: I object on behalf of the company also on the ground that both exhibits are immaterial to the issues.

Trial Examiner Royster: All right, let us see them.

Mr. Flood: We think, among others, the entire document is admissible but among other provisions that are distinctly germane are the provisions with respect to the union label.

Trial Examiner Royster: Well, I think that you will have to speak out very clearly now and forthrightly as to just what your defense in this proceeding is. Now if the union label is a part of your defense I think you should tell us so and tell us why.

Now for that purpose if you want the hearing room cleared of all but counsel for any reason, as you suggested earlier that you did not want to disclose everything to the witnesses, that will be all right but I am somewhat in the dark, considerably in the dark as to just how the union label enters into your defense here and I want to know how.

Mr. Flood: Well, I think that we will ask for the rule of exclusion.

Trial Examiner Royster: All right.

All but counsel and the official reporter will leave for the moment?

The Witness: Do you want me to leave too?

Trial Examiner Royster: Yes.

(Witness excused.)

Mr. Flood: Your Honor inquires about the relevancy of the union label within the issues of this case?

Trial Examiner Royster: Yes.

Mr. Flood: Now we are being charged with a violation of 8(b)(4)(a) in that it is alleged that we have caused and forced a refusal to work, and when I say "we" I mean Mr. Brown and the Oregon-Washington District Council, the Washington-Oregon District Council have forced the employees of the Sound Shingle Company to cease working upon a carload of shingles because those shingles were Canadian shingles and that we have a campaign of some sort or other to exclude [194] Canadian shingles as Canadian shingles.

Now that completely distorts the actualities and the realities of this case.

The Washington-Oregon District Council have organized, as they have a legitimate right to do, some 400 shingle operations in this area comprising practically the entire shingle industry within their area. And their constitution and the by-laws require that every product that they work upon, every shingle product that they work on, including by-products bear the union label and be entitled to the union label and be manufactured under union label conditions.

Mr. Brown is doing nothing more nor less and the Washington-Oregon District Council is doing nothing more nor less than to seek to establish union label conditions in all of those plants including Sound Shingle plant with whom they have a contract.

Now, so long as Sound Shingle plant operated under conditions where it employed only union labelled stewards and union labelled products and by-products, shingles, there was no difficulty. That their operations were in accordance both with their contract and with the union's membership. I mean the membership's obligations.

Under the constitution the member himself swears as a part of his membership that he will work on nothing but union labelled goods. The union label—

Trial Examiner Royster: Excuse me, that is in the constitution and by-laws that you have offered, is that?

Mr. Flood: Yes.

Do you want to hear further?

Trial Examiner Royster: Yes, go ahead.

Mr. Flood: Now, since we are compelled to disclose what our purpose in this matter is the National Labor Relations Board by this proceeding seeks to compel the members of the local union in violation of their obligation of membership imposed upon them in their constitution and in violation of Article VI as we conceded in the collective bargaining contract to take a product that belongs to North Shore, that was manufactured in non-union labelled conditions, under non-labelled conditions, unfair to this union, where 75 per cent. of the manufacturing process has been unfair to the union and then as a mere finishing polishing process to take that scab product and by means of this device which was cleverly conceived to conceal its purpose, compel our members to launch that product in interstate com-

merce, pawning it off as representative, as a product representative of union labelled conditions. Something that under the common law would clearly be branded as unfair competition and fraud. That is the issue in this case. I could elaborate on it.

Trial Examiner Royster: Well, perhaps you will want to [196] after I ask you a question or two, or make a statement or two.

Now, the facts in the case so far show without any contradiction whatsoever that these shingles were not manufactured under what the union, the District Council, and the respondent local here would term union conditions.

When the car was opened the remark was made "These are unfair shingles." There is not a scintilla of evidence that there was any sort of a label on the shingles at that time which would indicate to anyone that they were made under conditions which the union and the District Council and the local would call union conditions. So to that point there is no dispute as to the facts of the case. You say, if I understand you correctly, these shingles were made under nonunion conditions and except for the testimony that perhaps the shingles were manufactured by employees who were members of an I.W.A. local up in Canada there is no contest about that.

Now, where do you go from there? Do you say that the reason that the men refused to work on those shingles was because they did not bear the imprint of the District Council or of local 2580?

Mr. Flood: So far as we are concerned, and our evidence is not all in, but I think that it is going to

be clear when the evidence is in that the employees themselves [197] exercising their own individual judgment, for their own individual reasons, whatever they may have been, concurred that they would not work upon those shingles because they did not bear the union label.

Trial Examiner Royster: Yes, but according to your statement, in taking that action if it was a voluntary action on the part of the employees, that is to say, if it was not in response to any direct order to the employees, it was nonetheless consistent with the obligations they took when they became members of the local 2580.

Mr. Flood: I can see that, yes. But to go farther and to show the relevancy of the North Shore label we merely seek to illustrate and to point out how salutary their individual action was when it now develops that the charging party here had conceived a plan to use the union, to use the locals there under a contract where they had the right, where the company had the right to the union label for the purpose of foisting into interstate commerce a product owned by North Shore as to which the union knew nothing whatsoever. The union assumed that it was manufacturing a Sound Shingle product.

Trial Examiner Royster: Well, now, of course, you are wondering what that North Shore label showed, whether it showed on it or indicated on it that the shingles were manufactured under what you call union conditions. [198]

Mr. Flood: Yes.

I may say, if your Honor please, that this is not a run of the mill case.

Trial Examiner Royster: I am commencing to realize that.

Mr. Flood: This is not a run of the mill case. It is one of the few cases, I was about to say the only case that I know of, but I can't say that; that it is one of the few cases where the board has undertaken to chastise a union in pursuing the union's legitimate objective in a controversy between the union and the union's employer and seeking to bring that within the orbit of a secondary boycott where there is clearly no secondary employer present.

Now, there has been one or two cases. There is the Conway Express case and the Dows vs. Shake metal workers cases, well considered cases, where this has been attempted and the courts have reversed the board.

Trial Examiner Royster: Well, they did not reverse them in Conway as I recall it. I think they went along with them.

Mr. Flood: No, that went along. They did not sustain such an attack upon the union.

Trial Examiner Royster: Yes, that is why you cite Section VI of your contract, I suppose, to bring it in line with the Conway Express case? [199]

Mr. Flood: Without by any means conceding that that is the only relevancy of Conway, Conway applies regardless of Section VI. Now since you have afforded us the opportunity to raise the issues we feel very much aggrieved about your Honor's

refusal to permit us to go into the Perma Products situation in Chehalis, Washington.

Here we have Mr. Barker and Mr. Martin who have a substantial proprietary interest in the Perma Products Company and Mr. Martin, the manager of that company and we have already discovered him fraudulently using our label.

Miss Krug: If the court please, I object to counsel's line of argument for the reason that it is immaterial to the issue and the examiner has already ruled upon the question and it has no bearing on the issues of the case.

Mr. Flood: I think the whole matter is at large now for discussion.

Trial Examiner Royster: Go ahead. I will hear you.

Mr. Flood: To such an extent where litigation in the Federal Court in Tacoma was disposed of by a stipulation signed by the president of the Perma Stain Company admitting their prior use and agreeing to cease and desist in the future from doing so.

Now, knowing that that company has in the very recent past made an improper misuse of our label and within two months thereafter opened up an operation in Marysville by [200] the same managers who managed the same kind of operation in Chehalis, we are not so naive as to assume that there is not some close inter-relationship between the two operations and their plans and the purpose of operations, which at all times include an attempt to use an unfair product and sell it in competition with fair products if possible to the greatest extent with

the use of our label. And with that particular fact in mind and the evidence as it already has developed and will further be developed that Mr. Martin in his Marysville operation sounded out the union as to whether anything could be done to permit him to use Canadian shingles up there. Now, we have appearing for the first time this morning, and partly yesterday morning, a new development. We did not know until this case developed that the union was going to be asked to work upon a North Shore product and launch it into the market in New York and Oregon and other competitive areas with what we contend will be our union label no matter what the testimony of the charging party may be.

Now this union label issue is so complex and so interrelated that I think all of the facts in connection with it ought to be developed in a case so unusual as this.

Could you add anything further?

Mr. Ward: I think Mr. Stuck testified with respect to bundles of shingles going out of the plant, they all had a [201] shipping label. The shipping label would be certigrade Red Cedar Shingles on which appears the brotherhood label. Up to the point when he was asked about that we heard nothing about a North Shore label. Our theory of the case is that those shingles and shakes would have been shipped out of North Shore, pardon me, out of Sound Shingle with Sound Shingle's labels or some indication that they had received a union label blessing when 75 per cent or 80 per cent of the work had already been performed by North Shore.

That same management had done that before, mis-used a union label. Now for the first time we hear that instead of Sound Shingle Company's labels going on bearing the imprint of the label, which is right there, North Shore's label would be placed on it.

Now whether Sound Shingle was going to pawn off these Canadian shingles as its product or was going to use the union label to aid North Shore is quite immaterial as it develops now with respect to a mis-use of a label because all members of the association has the same standard label, a certigrade red cedar shingle label, containing the label of the brotherhood. Once you look at that it says it is a union product.

This company has used a union operated mill to pawn off a non-union made product. No matter how you look at it, whether the North Shore label is on there, or whether, and it [202] would make it worse if Sound Shingle's label were put on this product which goes through one process and looks as though it comes from Sound Shingle's mill.

Trial Examiner Royster: Yes, but of course none of these shingles were shipped and there was a label attached to none of them as far as the evidence is concerned.

Mr. Ward: That is true but up to that point, up to the point where it was about to be discovered, keeping in mind that Mr. Martin was the manager of the Perma Company who had engaged in the illegal use or the fraudulent use of a label, up to that point when that was discovered, these men re-

fused to work on the label because Mr. Brown did not call them out of the plant, out of employment; he was called on the telephone and told that the work had stopped and the men had gone home.

Even there where is the inducement and coercion on the part of the union to cause a strike or a work stoppage?

Now, they are smart enough to know what this man was doing. But this was a big issue in the district Council and Mr. Flood was the attorney for the District Council represented to sue the company.

Mr. Flood: What obligation did the members of the union have to wait until the horse was stolen before they closed the barn door?

Mr. Ward: In other words it was bad enough as the men [203] saw it that they came in without a label and they knew that if it were put through the shake machine for that one process a label, a shipping label of some sort was going on those shakes; it was either this label. Now as it turns out it is the North Shore's label which to me makes it worse. I would prefer to have seen them put this label on it.

Trial Examiner Royster: Haven't you got just about all of your facts in?

Mr. Ward: No.

Trial Examiner Royster: What more do you want to prove?

Mr. Ward: Well, as the state of the record we want this in the record.

Trial Examiner Royster: You are coming down now to a question of law.

Mr. Flood: This is what we asked the continuance for this morning. We want this in and we want the constitution in.

Mr. Ward: We want all of the information in and we want the North Shore label in.

Mr. Flood: We want our union label certificate of registration in and we have a little bit of testimony that we want from Mr. Brown in connection with January 11th.

Mr. Ward: And what his activities with respect to the work stoppage were; he did not cause it. That is not in now. That is our defense.

Trial Examiner Royster: How about this North Shore label? [204] What is your position on the North Shore label, Miss Krug and Mr. Constantine?

Mr. Constantine: I will be glad to tell you, Mr. Examiner, that the company and, when I say company I am referring to Sound Shingle, does not intend to use the so-called union label on these shakes.

Trial Examiner Royster: Well, aside from that what is your position on getting that North Shore label in here?

Mr. Constantine: I am perfectly willing to have it come in but I don't want to have him drag in several boxes. They are all the same, Mr. Examiner, and I am perfectly willing to have it come in.

Trial Examiner Royster: Would it be an agreeable procedure, Miss Krug, and Mr. Constantine, and Mr. Flood and Mr. Ward to have a couple of you, Mr. Flood being one, get on the telephone to

the Marysville plant and have someone out there read the North Shore label?

Mr. Constantine: We will bring it in.

Miss Krug: We can bring a label in.

Mr. Constantine: We can bring the label in.

Trial Examiner Royster: Is Marysville, Washington, nearby?

Mr. Constantine: Yes, it is near Everett, Washington.

Mr. Flood: It is just about 32 miles from Seattle.

Mr. Constantine: I do not see why they should have to [205] bring in all the cartons.

Trial Examiner Royster: Why do you want these?

Mr. Flood: We have asked them to bring in what they can; we have asked for nothing unreasonable. If they cannot do it, they can say so. We are not going to be unreasonable about that. But we do not want to be trapped by something that they have in their office that they could have produced and failed to produce. That is all.

Trial Examiner Royster: You want a North Shore label. Now there may be many things in the office that might be interesting to you but would not have anything to do with the case and you want a North Shore label. Now, why do you want the other records that you asked for in the subpoena?

Mr. Ward: Because of the mention for the first time the petition to the Circuit Court, or rather District Court, of an alleged contract between North Shore and the Sound Shingle Company.

Trial Examiner Royster: Well, the testimony is that there was an oral contract.

Mr. Ward: That is right. That is what took me by surprise.

Mr. Flood: We were certainly amazed when the petition in Federal Court pleaded a long term contract. We assumed, I agree that I was extremely negligent in the assumption. I should have immediately asked but the Court did not give me [206] time; I should have immediately asked for a motion making more definite and certain, a motion to make more definite and certain and determine whether it is oral or written, ~~but~~ I assumed that it was written.

Trial Examiner Royster: And the contract would speak for itself.

Mr. Flood: Now the contract is nothing more than what the witness wishes to make it appear to be from the stand. It changes from day to day.

Trial Examiner Royster: Have you got a copy of the subpoena?

Miss Krug: I have it right here.

Mr. Flood: The contract changes every time the witness takes the witness chair.

Trial Examiner Royster: Well, when you say and and all labels you mean types?

Mr. Flood: Yes. If they have cartons and cartons of labels we are not interested in them.

Trial Examiner Royster: Yes.

Mr. Flood: We are interested in a label as a sample.

Mr. Ward: If you want to know why it is because the Red Cedar Shingle Association has what is called a certigrade, which is one form of label and there may be other labels that North Shore uses

on another brand or something of that sort. These are grade one or the blue label or something. [207] There may be three or four other types and brands.

Trial Examiner Royster: Well, then you are looking for, as you say here, all of the documents. Well that would include any contract?

Mr. Flood: Any contracts.

Trial Examiner Royster: Between North Shore and Sound Shingle?

Mr. Flood: That is right.

Miss Krug: And it would also include correspondence.

Mr. Flood: It would also include correspondence that might integrate into a contract. We are entitled to objectify that contract as much as we can.

Mr. Ward: Now, getting back to Mr. Stuck's testimony yesterday, Mr. Examiner, when we asked about what the plan might have been with respect to these shakes he was a little—I would not say evasive—but he did not quite know. Now it develops that Mr. Martin knew precisely that the North Shore Shingle Company label was going on those shakes but Mr. Stuck was in the office and he should have known and he did not know much about it.

Trial Examiner Royster: Well, Miss Krug, would that be an inordinate burden to bring in the correspondence and the label?

Miss Krug: Well, if the court please, I think that to bring it in by 2:00 o'clock would be. Now I don't know—— [208]

Trial Examiner Royster: Could you not get on

the telephone and ask Mr. Stuck to come down here with it?

Miss Krug: Yes, if he can lay his hands on everything that is called for here within that time, why, I am sure that he would be glad to accommodate. However, I think that we should have certainly at least the balance of the afternoon.

Mr. Ward: We are in no hurry.

Miss Krug: In which to produce those matters; and again I still maintain my objection with reference to documents, invoices and shipping records. Certainly as being utterly immaterial. Now, I would like to be heard on some of the points if I might that counsel have made.

I was under the impression when the room was cleared that this, the subject under discussion was my or rather our objection, the General Counsel's objection and my objection to the admission of the constitution and by-laws of the union. (Respondent's Exhibits 7 and 8).

It seems to have gone rather far afield.

Mr. Ward: We were asked to state our position, keep that in mind, by the Trial Examiner. [209]

* * * * *

Mr. Ward: May I ask one question?

Trial Examiner Royster: Yes.

Mr. Ward: Do I understand you to say that there was no agreement between the union and your company with respect to the union label?

Miss Krug: There has been no evidence of any agreement.

Mr. Ward: Did I understand you to say that?

Miss Krug: There has been no evidence yet adduced here of any agreement between Sound Shingle and the union with respect to any union label.

Mr. Ward: Now, you realize, of course, that this is our case that we are going over now as defense counsel? So you are anticipating that offer. All right.

Miss Krug: Surely.

Mr. Ward: Now, there is an agreement, sir, and we will get down to the facts of economic life. You go on a job and you see a bundle of shingles with a label "North Shore Shingle Company" on it and there will be no union label on it. Inquiry will lead to the fact that actually that bundle came out of Sound Shingle Company and they look up and they find that Sound Shingle Company has a label. Therefore that bundle is given a blessing. That is the reality of the situation. And it takes astuteness to be able to put that over so that you will head off all inquiry because just a [215] cursory examination will reveal no union label but further investigation will certainly disclose that that particular bundle came from a union labeled shop, Sound Shingle Company. It has been given a blessing, you see. The union label has been used on it. The most important thing is the finished product, to make a shake from a shingle and inquiry would readily reveal that that bundle did come from a shop that had been granted the use of a union label by agreement between the union and the company and that contract calling for the use of the union label has not been produced in evidence yet. We have not come to our case.

That is the actual realities of the situation.

Mr. Constantine: I want briefly to point out that there is no evidence that any reasonable person looking at these bundles could conclude that these bundles did come from North Shore, Mr. Examiner. The only evidence now in before your Honor is that anyone examining these bundles will readily see that they are North Shore shingles and not Sound Shingle's shingles.

Mr. Flood: Maybe the label——

Mr. Ward (Interposing): I don't know how I can make it any clearer. I said the actual fact of economic life which you are guided by and not some theoretician, a mere inspection, a mere investigation would lead anybody to, anybody back to the Sound Shingle company where the last step [216] to make the shakes was performed. Is that not true? That is what we are discussing here.

Mr. Constantine: Sound Shingle's name will not appear on them.

Mr. Ward: That is precisely what I am talking about.

Mr. Flood: If you are doubtful about that why not product a label and let us look at it?

Mr. Ward: A North Shore label would be put upon it. I asked Mr. Stuck yesterday what the plan was and he did not know. Now it turns out that Mr. Martin glibly says, "Why, we put a label on that" but he has the blessing of union labor, did he not? What are we fighting about here? Where is the dispute? It is with the Sound Shingle Company, is

it not? If it is not meant using a label, what could it possibly be? The men have done it before.

Trial Examiner Royster: All right.

Mr. Ward: The unfortunate thing about it is that we never got an injunction against him.

Miss Krug: You are not depending on the misuse of North Shore's label, I hope?

Mr. Ward: Excuse me? I am not what?

Miss Krug: You are not defending this case theory that North Shore's label was about to be misused, I assume?

Mr. Ward: I have no concern with North Shore's label. I realize that the union in this plant was to be misused [217] because it was a union label on a non-union product. That is what we are talking about.

Trial Examiner Royster: Well, I thank all of you for the enlightenment that you have given me in this argument. Now, the ruling is that the subpoena is quashed in its entirety and that respondent's Exhibits Nos. 7 and 8 are rejected and will go into the rejected file.

(The documents heretofore marked Respondent's Exhibits Nos. 7 and 8 for identification, were rejected.)

[See pages 65-197 of this printed Record.]

Mr. Flood: Now, if you will just give us a moment's recess because we now want to make an offer of proof.

Trial Examiner Royster: All right.

Miss Krug: May we then bring our client in?

Trial Examiner Royster: Yes.

Mr. Flood: Give us a ten-minute recess, please.

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Trial Examiner Royster: All right.

Miss Krug: May we then bring our client in?

Trial Examiner Royster: Yes.

Mr. Flood: Give us a ten-minute recess, please.

Mr. Constantine: Does Mr. Flood want to make the offer of proof in the absence of the witnesses? I have no objection to keeping them out until he makes his offer of proof.

Mr. Flood: I want about a ten-minute recess.

Mr. Constantine: Oh, all right.

Trial Examiner Royster: We will take a short recess.

(Short recess.)

Trial Examiner Royster: On the record.

Mr. Flood: Pursuant to the rules and regulations of the [218] National Labor Relations Board, Section 102.30 and the requirements on page 10, the Trial Examiner shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke.

Trial Examiner Royster: And you want such a statement?

Mr. Flood: Preliminary to our next motion.

Trial Examiner Royster: Yes. The reason that I have granted the motion to quash is that I considered that the evidence started to be adduced by the subpoena duces tecum is immaterial to the proceedings, the issues framed by the complaint.

Mr. Ward: Then, I move, your Honor, that your ruling be made a part of the record pursuant to the same rule.

Trial Examiner Royster: It is a part of the record. I just stated it on the record.

Mr. Ward: I move that you put it on or the Board will not consider it, under the rules.

Trial Examiner Royster: But it is on the record.

I just made it on the record. I do not understand you, I guess.

Mr. Ward: The petition to revoke, any answer filed thereto and any ruling thereon shall not become a part of the official record except upon the request of the party aggrieved by the ruling.

Sir, I am now asking that it be put on the record.

Trial Examiner Royster: The motion to quash was made [219] upon the record and my ruling in connection with it was made on the record and my reasons for granting the motion to quash all were made on the record.

Mr. Ward: All right.

Trial Examiner Royster: And they all are part of the record.

Mr. Ward: Thank you, sir.

Mr. Flood: Now, I don't know, I don't want to impose or appear to presume too much upon the court and parties but whether we rest at this point or put on a certain amount of further testimony which in any case will be brief is a matter to which we would like to give a little consideration and I therefore request that we recess until after lunch.

Trial Examiner Royster: Well, do you want to go to lunch right now and come back at 12:30?

Mr. Flood: I want a little time to discuss this with the parties.

Trial Examiner Royster: Is 1:00 o'clock agreeable?

Mr. Flood: Yes. 1:00 o'clock is agreeable.

(Whereupon, a recess was taken until 1:00 o'clock, p.m.) [220]

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 1:00 o'clock, p.m.)

Trial Examiner Royster: On the record. You may proceed.

Mr. Flood: Was Mr. Brown on the witness stand when we concluded?

Trial Examiner Royster: I think that he was. Do you have further questions of him?

Mr. Flood: I have a question or so of Mr. Brown, yes.

ARTHUR BROWN

previously sworn, testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Flood): Mr. Brown, where were you on January 11th, 1952?

A. In the Bellingham Hotel at Bellingham, Washington.

Q. Did you at that time know anything about a shipment of Canadian shingles received at the Sound Shingle spur?

A. Not until in the evening sometime.

Q. And that knowledge came to you as a result of what?

A. A telephone call from Mr. Martin.

Q. Mr. John E. Martin calling you from Chelalis? A. That is right.

Q. Up to that time you knew nothing about it?

A. Nothing whatsoever.

(Testimony of Arthur Brown.)

Q. Did you order any of the employees of the shake plant [221] not to work on any shingles?

A. I did not.

Q. What did Mr. Martin tell you when he called from Chehalis?

A. Well, that is quite a long story if you want it. The first question was if Mr. Jack Butters had called me and I told him "No" I had not heard from Mr. Jack Butters, and he said, "Well, he was supposed to call you" and I said, "Well, I am sorry I did not have any call from him." And then he said, "Our boys are out in Marysville. Do you know it?" And I told him "No, I had no idea of it."

Q. And then you had a——

A. And then he said, "Will you put them back to work?" And I said "No, Mr. Martin, can't you wait until I get home and we will see what it is all about?" And he said, "No, I want that mill to start the next morning."

"Well," I said, "I am sorry, I won't make no deal over the telephone."

Immediately he said, "If you don't get them boys back to work I will send down to Chehalis and get a crew down there to work them."

And, of course, I kind of blew my top and told him to go ahead and get them if he thought he could do it and one word lead to another from there on.

Q. Was there any new or further information contained in [221] the conversation from then on or was it just an exchange of epithets?

(Testimony of Arthur Brown.)

A. No, not to my knowledge. We had a few harsh words.

Q. But you agreed then to meet him on your return from the convention?

A. No, I did not.

Q. Oh.

A. We talked, I would say, for about 30 minutes and then about oh, maybe one hour later Mr. Butters called me up and told me that——

Mr. Constantine: I object to any conversation between witness and Mr. Butters.

Mr. Flood: Yes, I am not asking for that.

Trial Examiner Royster: Aren't you?

Mr. Flood: No.

Did you then meet with Mr. Martin thereafter?

A. Well, about the next day Mr. Stuck called me up.

Q. And arranged for a meeting with Mr. Martin?

A. And arranged for a meeting with Mr. Martin.

Q. When was that meeting with Mr. Martin?

A. I told Mr. Stuck that I would be in Marysville on Sunday, sometime Sunday. I did not know exactly what time I would get in.

Q. Yes.

A. And around 4:30 o'clock, p.m. I drove in to Mr. Martin's [222] office and made arrangements for the meeting for the next day.

Q. For Monday?

A. Monday, January 14th, 1952.

(Testimony of Arthur Brown.)

Q. Was this a meeting at 4:00 o'clock?

A. That is right.

Q. At that meeting what did Mr. Martin ask you to do?

A. The first thing he done when I went in the office was to apologize for his conduct over the telephone.

Mr. Constantine: Are we now on the January 14th meeting or the January 13th meeting? I am sorry I did not follow the evidence.

Mr. Flood: The fourteenth, Monday afternoon January 14 at 4:00 o'clock p.m.

Mr. Constantine: All right.

The Witness: "Well," I said, "Maybe both of us got a little bit hot under the collar."

Q. (By Mr. Flood): And that meeting lasted quite a long time and I just want to get the information.

A. Yes. About three hours or three hours and a half.

Q. I am not particularly asking for every word that you exchanged verbatim during that three hours and a half. Just give me the substance of what Mr. Martin asked you to do.

A. He asked me if I, if I would not see that them men went back to work and I absolutely——

Q. In substance what was the reply? [223]

A. Absolutely no; I did not call them out and I wasn't going to ask them to go back.

Q. As you were leaving did you have any discussion with respect to your collective bargaining

(Testimony of Arthur Brown.)

contract and whether or not you were in violation thereof?

A. Well, Mr. Martin asked me if I had not violated the contract and I turned around and I said, "You can use your own judgment." Then after I had walked out and got to thinking well maybe I am off a little bit, I went back, which our contract calls for, to make it out in writing. And I asked Mr. Martin if he wanted it out in writing.

Q. Was that with reference to your agreement procedure? A. Yes.

Q. What did Mr. Martin say?

A. He stated, "No, it was too late."

Now I would like to give the reason of this. Our District Council, or rather not our District Council but our operator, joint board member, had passed away that day or the day before. He left us without a joint board member there to go through the procedure of the agreement, to make out to each other in writing the agreement and we had twenty-four hours, according to the agreement, to iron out the difficulties. He left us without a joint district board member on the operator's side. He had passed away the next day so I asked Mr. Martin if I should make it out in writing and he said [224] no.

Q. You mean that he passed away the day before? A. The day before, that is right.

Q. Was that the gentleman whose funeral you were going to attend?

A. That is right, I went over.

Q. His name was what?

(Testimony of Arthur Brown.)

A. Frank Marshall.

Q. And you asked Mr. Martin if you could make it out in writing and he said that it was too late?

A. That is right.

Mr. Flood: I think that that is all.

You may examine.

Cross Examination

Q. (By Mr. Constantine): Can you briefly tell the examiner the set-up of the District Council. As I understand it, it is composed of all——

Mr. Flood: Just a minute. You have asked the question and I think that you had ought to give him an opportunity to answer it.

Mr. Constantine: All right. I will withdraw the question.

Q. (By Mr. Constantine): The set-up of the District Council, how is it composed, Mr. Brown.

A. We are set up with 16 different locals and each local [225] has a vice president that represents each local and these vice presidents compose what we call the Executive Board and the council is set up in the position wherein each and every year we have what we call a joint board. There are seven operators and seven shingle weavers that sit on a joint board to negotiate an agreement.

Q. That is the joint board referred to in this contract which is Respondent's Exhibit No. 4?

A. That is right. Yes.

Q. And is local 2580 from Everett one of the un-

(Testimony of Arthur Brown.)

ions which is a constituent member of the District Council?

A. At this time we are, the joint board consists of districts.

Q. No, I am talking about your own District Council.

A. That is what I am trying to tell you. Everett, Seattle and Port Angeles are represented by one man on a joint board.

Q. But even if they are not represented on the joint board, all of these local unions are part of the District Council? A. That is right.

Q. And that includes local 2580?

A. That is right.

Q. And Mr. Glenn Uttley is a member of local 2580, is he? A. That is right.

Q. Do you know his position in the local?

A. At that time he was president and also District Council [226] vice president.

Q. At that time, you are referring to during the month of January and February of this year?

A. That is right.

Q. And Mr. Sarrett was a field representative at that time?

A. I would not call him a field representative.

Q. All right. What would you call him?

A. I would call him a man that we have, a promoter.

Q. A promoter?

A. A promotion man to promote the union label throughout the whole industry.

(Testimony of Arthur Brown.)

Q. A promotion man for the local or for the District Council? A. For the District Council.

Q. And would you say that was also true of Fred Baker? Is he a promotion man?

A. No, he was not.

Q. What is his position?

A. He is only a district council vice president from Portland, Wheeler, Eugene and Kalama local.

Q. In other words he is the district council vice-president and was at that time? A. Yes.

Q. All right. And do you know if Mr. Jack Butters is a member of local 2580? [227]

A. I think he is, yes.

Q. That is your own local, is it not?

A. Yes.

Q. You hold no position in your own local, do you? A. No.

Q. You are just president of the District Council? A. That is right.

Mr. Constantine: I have no more questions.

Miss Krug: I have no questions.

Mr. Flood: Do you have a question?

Trial Examiner Royster: No.

Redirect Examination

Q. (By Mr. Flood): Mr. Brown, the set-up of your District Council is authoritatively and completely set forth in your constitution and by-laws, is it not? A. That is right.

Mr. Flood: Now I offer that as the best evidence and most complete evidence of it.

(Testimony of Arthur Brown.)

Trial Examiner Royster: All right.

Mr. Constantine: I have no objection to it only to this extent, Mr. Examiner——

Mr. Flood: Well, you asked for it.

Mr. Constantine: As to the extent of the composition of the Council. I object to the whole thing going in.

Mr. Flood: Well, I am offering it for whatever [228] materiality it has. It was invited by counsel's line of inquiry and if it is admissible for one purpose I am going to use its admissibility for whatever purposes it is competent for.

Miss Krug: Well, I will object also on behalf of the Sound Shingle Company to the use of the constitution and by-laws for any purpose other than the purpose for which counsel stated he was offering it; namely as evidence of the organization of the District Council.

Trial Examiner Royster: It is admitted for that purpose.

Is that the council's constitution and by-laws?

Mr. Flood: Yes.

Trial Examiner Royster: That is Respondent's Exhibit No. 8 which now is removed from the rejected file and received in evidence.

(Thereupon the document previously marked Respondent's Exhibit No. 8 and previously rejected was admitted in evidence.)

[See pages 167-197 of this printed Record.]

Q. (By Mr. Flood): Does your local Everett

(Testimony of Arthur Brown.)

council have a constitution and by-laws, or your Everett local, I mean, 2580?

A. I think they have something up there; I don't know.

Q. In any event you do not have it available?

A. No, I do not.

Q. All right. [229] That is all.

Trial Examiner Royster: Is there anything else?

Mr. Constantine: I have one more question.

Recross Examination

Q. (By Mr. Constantine): Is "The Shingle Weaver" put out by the District Council?

A. Yes.

Q. How often does it come out?

A. Every thirty days.

Q. Every thirty days?

Mr. Constantine: I have no more questions.

Miss Krug: I have no more questions.

Redirect Examination—(Continued)

Q. (By Mr. Flood): Mr. Brown, do you under-
your contract with the, your collective bargaining
contract with the Sound Shingle Company, have
any authority to assume responsibility for unau-
thorized acts of your members?

Mr. Constantine: I object, your Honor. The best
evidence is the contract itself.

Trial Examiner Royster: It would speak for
itself I assume in that connection.

(Testimony of Arthur Brown.)

Do you want to call my attention to any particular part or paragraph?

Mr. Flood: Yes. Contract Article II page 7 (c).

Trial Examiner Royster: All right. [230]

Mr. Flood: That is all.

Trial Examiner Royster: That seems to be all, Mr. Brown.

(Witness excused.)

Mr. Flood: I will call Mr. Jack Butters.

JACK BUTTERS

a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Flood): What is your name, Mr. Butters?

A. Jack Butters.

Q. And where do you live?

A. 1929 Lombard Street, Everett, Washington.

Q. How long have you lived there?

A. Oh, approximately 14 years.

Q. Have you had any employment experience at the Sound Shingle Company at Everett?

A. Yes.

Q. Working there? A. Yes.

Q. What kind of work?

A. Under the present ownership I was employed as a superintendent.

(Testimony of Jack Butters.)

Q. Had you worked there before the present ownership acquired it? [231] A. Yes.

Q. What did you do at that time?

A. Well, at that time I was classed as a millwright.

Q. When did you assume the position of superintendent of the Sound Shingle operation?

A. Well, it was on approximately about the fifteenth of January, I believe, in 1951.

Q. And you remained superintendent until when?

A. Until around January 11th or January 12th, 1952.

Q. The morning of January 12th, was it?

A. I believe it was the morning of January 12th, 1952.

Q. I assume you were terminated at that moment?

A. I was notified so and my check was made out for me.

Mr. Flood: At this time I will ask the official reporter to kindly mark Respondent's Exhibits Nos. 9 and 10.

(Whereupon the documents above referred to were marked Respondent's Exhibits No. 9 and No. 10 for identification.)

Q. (By Mr. Flood): Who employed you? Mr. Martin?

A. Mr. Martin and Mr. Barker both.

Q. What agreement did you have with them when you entered upon your superintendency there?

(Testimony of Jack Butters.)

A. Well, the oral agreement was that the mill would be operated under the same conditions that it had been by the former owners. [232]

Q. Who had charge of hiring and firing?

A. I did.

Q. And who had charge of industrial relations with the employees?

A. That was part of my job.

Q. Showing you our Exhibit 9 for identification, what is that, Mr. Butters?

A. Well, that is a union label agreement that is usually signed by some authority in the plant.

Q. What signatures does it bear?

A. Whose signatures?

Q. Yes. A. It bears my signature.

Q. Yours and who else?

A. No one else's. It has the Sound Shingle Company on it.

Q. Oh, I see. A. By myself.

Q. And showing you our No. 10, what is that, Mr. Butters?

A. That is a certigrade label, No. 1 label.

Mr. Flood: I offer No. 9.

Mr. Constantine: I object to Respondent's Exhibit No. 9.

Miss Krug: I will also object to Respondent's Exhibit No. 9 on behalf of the company.

Trial Examiner Royster: Well, is this in pursuance of the same line that was the subject of argument and discussion [233] before lunch I take it, Mr. Flood?

(Testimony of Jack Butters.)

Mr. Constantine: I have an additional objection in addition to the grounds already stated and advanced pursuant to that argument before lunch. And that is that it is not within the actual or the apparent scope of the authority of this superintendent to sign an alleged contract on behalf of the partnership.

Mr. Flood: Well, that is a matter, that is a factual question to be resolved after cross-examination by the trier of the facts.

Trial Examiner Royster: Let's see, is that Respondent's Exhibit No. 9?

Mr. Flood: Yes.

Miss Krug: Before it is admitted?

Mr. Flood: Not to be determined before it is admitted.

Trial Examiner Royster: I will receive it.

(Thereupon the document heretofore marked Respondent's Exhibit No. 9 for identification, was received in evidence.)

[See page 198 of this printed Record.]

Mr. Flood: And in connection with it, your Honor, I call your Honor's attention to the statement of counsel this morning that there was no contract.

Q. (By Mr. Flood): Now, what is Respondent's Exhibit No. 10?

A. That is a certigrade label bearing the name of Sound Shingle Company, Marysville, Washington, and also has the union [234] label on it.

(Testimony of Jack Butters.)

Q. It has the union label of the brotherhood on it?

A. That is right.

Q. Have you seen such labels before?

A. Yes.

Q. To what extent do you know that they were used during the period that you were superintendent in the operation of the plant?

A. Well, they were applied to every bundle of shingles that went out of the mill, out of the shingle mill and also applied to every bundle that went out of the shake mill except on some occasions when the union label alone was put on.

Q. When the union stamp was put on?

A. Yes.

Q. The union stamp is identical, is it not, with the stamp appearing here except that it does not contain the name of the Sound Shingle?

A. That is right.

Q. But it is a brotherhood stamp?

A. It is.

Mr. Flood: I will offer Respondent's Exhibit No. 10 in evidence.

Mr. Constantine: No objections.

Miss Krug: I object to No. 10 on the ground that it is [235] immaterial in any of the issues framed in this case. There is no evidence that it was attached to any of the shingles involved in this case or that anybody intended to attach it to any of the shingles involved in this case.

Trial Examiner Royster: I will reject Exhibit No. 10.

(Testimony of Jack Butters.)

(The document heretofore marked Respondent's Exhibit No. 10 for identification, was rejected.)

[See page 199 of this printed Record.]

Trial Examiner Royster: It goes in the rejected file.

Mr. Flood: I will check with the official reporter on the rejected exhibits. I have some of them here on my desk.

Q. (By Mr. Flood): Were any shingles or any bundles of shingles or any bundles of grooved shakes shipped from the plant during the time that you were superintendent without this, the certigrade label bearing the union stamp?

A. Well, there were some shipped that did not have the certigrade label on them but they had the union stamp on them, the union label.

Q. Were you ever asked by the company to use any other label? A. No.

Q. Under your agreement with the company and under the collective bargaining agreement, were you familiar with the collective bargaining agreement? A. Fairly familiar, yes.

Q. And you signed the union label agreement, did you not? [236]

A. That is right.

Q. Under those agreements was it possible for you to ship shingles without attaching either the stamp or the labels to them?

Miss Krug: I object to that.

Mr. Constantine: I object to that.

(Testimony of Jack Butters.)

Trial Examiner Royster: I will sustain the objection.

Q. (By Mr. Flood): Did you ever see any North Shore labels at the plant?

A. Well, none except what came in the one car in dispute.

Q. You never saw any supply of labels there, did you? A. No.

Q. And you were never asked to use them?

A. No.

Q. Were you there on January 11th?

A. Yes.

Q. What did you have to do, if anything, with the carload that arrived from the Great Northern spur?

A. Well, my job there was usually on cars that are shipped in; I break the seal on the cars and help open the door.

Q. What did you do in this case; just describe what you did.

A. I broke the seal on the car and opened the door.

Q. And what further?

A. I just don't remember now whether I pulled the bundle [237] out of the doorway or someone else did but the bundle was pulled out of the doorway and examined and it was found that——

Q. Did you see any label on it?

A. It was found that the North Shore label was on it; that is, the certigrade label with the North Shore trade name on it.

(Testimony of Jack Butters.)

Q. It was a certigrade label similar to the certigrade Respondent's Exhibit No. 10 which the court rejected, was it?

A. That is right except that it did not have the union label on it.

Q. Except that it did not have the union label on it?

A. It did not have the union label on it.

Q. And then what happened?

A. The men at that time made the statement that due to the fact that the union label was not on the product that they would have to decline from using that product, that is from processing those shingles into shakes until they were notified as to whether it was proper to groove them.

Q. What did the men do?

A. They went home.

Q. Did you order them to go home?

A. No, I did not.

Q. What was your, the reason for your discharge the next morning?

Mr. Constantine: I object. [238]

Trial Examiner Royster: I will overrule the objection. Do you mean what reason was given him?

Mr. Flood: Yes.

Trial Examiner Royster: All right.

The Witness: On January 11th when this car load of Canadian shingles came in Mr. Ralph Stuck called Mr. John Martin at Chehalis.

(Testimony of Jack Butters.)

Mr. Constantine: I object to any conversation between Mr. Stuck and Mr. Martin.

Trial Examiner Royster: I will over-rule the objection.

Mr. Constantine: All right.

The Witness: After their conversation was over with, Mr. Martin asked to speak to me and during the course of our conversation he asked me if I still thought the same way that I had the time previous to that regarding Canadian shingles and I told him that I wasn't in the habit of changing my mind on things like that.

Q. I take it you had had some previous conversation with him on this subject?

A. That is right.

Q. When had that been?

A. Oh, I imagine a couple of months maybe before that, I wouldn't say the exact date.

Q. What position had you taken at that time?

A. That due to the fact that Canadian shingles were [239] considered unfair by the union and I, knowing that bringing them in and trying to process them in that plant would create a dispute between the Sound Shingle Company and the union, that, and due to the fact that I still carried a union card and I considered that I was not necessarily bound to the union, the union was not my bargaining agent, but this was only my personal feeling on the situation that Canadian shingles should not be brought in.

Mr. Flood: You may examine.

(Testimony of Jack Butters.)

Cross Examination

Q. (By Mr. Constantine): Mr. Butters, on January 11th when you went to open the car which contained the North Shore Shingles, there were some other working men with you, weren't there?

A. Yes, that is right.

Q. They were all from the shake mill?

A. That is right.

Q. Do you recall today who they were?

A. Well, there was John A. Martin, the packer on the second shift.

Q. John A. Martin is also the shop steward for the local?

A. That is right. Elwin Rosenback was the feeder on the second shift. Walter Nelson was the floor man. He opened the bundles and did other work. And, well, I believe Curley Richards was there, too, but I would not swear to that for sure but I believe he was there.

Q. Would you say that those were all the employes in the shake mill at that time? Were there any others in the shake mill?

A. Well, there were more employees of the shake mill, yes.

Q. And when these fellows whom you have described by name left work, what happened to the others in the shake mill? Did they stay or did they go home?

A. They all went home.

Q. They all went home? A. That is right.

Q. You sent them home?

A. No, I did not, no.

(Testimony of Jack Butters.)

Q. Did Mr. Stuck send them home?

A. No.

Q. They just went home?

A. They just went home.

Q. How many others went home from the shake mill?
A. All that were there.

Q. All of them. Do you know about how many more men there were in the shake mill who were not out there at the car when you were there?

A. There were no other ones in the shake mill. They were all out there at the car.

Q. So all of those at the car were the whole group who were [241] then employed at the shake mill on that second shift?

A. Well, all who were there were employed in the shake mill as I remember.

Q. What I would like to know is was there any-one other than those you have described by name who went home or were those all the employees in the shake mill at the time?

A. Well, there was no other ones that I could recall that were there at that present time except those that I mentioned.

Q. Yes. And everybody in the shake mill went home?
A. All that were there, yes.

Q. So after they went home there was no one left to work in the shake mill?

A. That is right.

Q. And as I recall the testimony in response to a question by Mr. Flood you said the men refused to work on these North Shore Shingles un-

(Testimony of Jack Butters.)

til they were notified whether it was proper to work on them? A. That is right.

Q. And do you mean notified by the company or by the union?

A. Well, I would not make a statement on that. I don't know who. They made that statement and I don't know who they talked to.

Q. Do you recall which man made the statement? A. No, I don't. [242]

Q. But as a result of that statement they all went home?

A. That is right.

Q. Do you know whether that shake mill has opened up since?

A. Not to my knowledge, I don't know. I would not say.

Q. And at the time they went home it was not quitting time, was it?

A. No. It was not the usual quitting time.

Q. What time is quitting time for that shift?

A. That shift ended around 9:00 o'clock p.m. in the evening.

Q. And this was about what time when they went home?

A. Oh, between 4:30 and 5:00 o'clock p.m. I would say.

Mr. Constantine: I have no more questions.

Miss Krug: I have no questions.

Trial Examiner Royster: Is there anything else?

Mr. Flood: Yes.

(Testimony of Jack Butters.)

Re-Direct Examination

Q. (By Mr. Flood): How many employees in all were there in the shake plant? A. Nine.

Q. And how many in the shingle mill?

A. Approximately twenty-four, I believe, or twenty-three, somewheres around there.

Q. What is the relationship between the shake mill and the [243] shake plant?

Trial Examiner Royster: The shake mill and the shake what?

Q. (By Mr. Flood): The shingle mill and the shake plant. A. Well, they are all—

Q. I will withdraw the question. How many shingle machines are there?

A. Three.

Q. And how many shake machines?

A. One.

Q. And where is the shake machine located with respect to the shingling machines?

A. Well, I would say at the north end of the dry kiln.

Q. And the dry kiln is used to dry shingles?

A. That is right.

Q. Manufactured in the shingle plant?

A. That is right.

Q. And the shake plant is in the same shed as the dry kiln?

A. Well, it is in a separate shed. There is about, oh I imagine about 60 feet separating the two.

Q. The dry kiln and the shake mill?

A. And the shake mill.

(Testimony of Jack Butters.)

Q. Now, where is it with reference to the shingle mill?

A. Well, it is north of the shingle mill. The shingle [244] mill is, I would say, on the south end of the dry kiln.

Q. And what is the flow of movement of shingles that are manufactured in the shingle mill as they are taken into the dry kiln and from the dry kiln to the grooving plant?

A. Well, the shingles are first loaded on trucks and then brought into the dry kiln and they are left there approximately some eight days to ten days and then they are taken out from there and run into the shake plant.

Q. They become stock out of which you groove shakes? A. That is right.

Q. And the whole operation was under your charge as superintendent? A. That is right.

Q. The hiring and firing and the entire operation? A. That is right.

Q. And the ownership was under Mr. Martin and Mr. Barker?

A. That is right.

Q. Mr. Stuck was the bookkeeper and accountant? A. He was the office manager.

Q. It was operating in all particulars the same as it had under the prior ownership?

Miss Krug: I object to that question.

Mr. Constantine: I join in the objection.

Trial Examiner Royster: All right, the objection is sustained. [245]

(Testimony of Jack Butters.)

Mr. Flood: That is all.

Trial Examiner Royster: Is there anything else?

Miss Krug: Before this witness is excused may I confer with my client just one moment?

Trial Examiner Royster: All right. May I see Respondent's Exhibit No. 9 a moment.

Miss Krug: I have a question or two.

Cross Examination

Q. (By Miss Krug): Mr. Butters, is all the handwriting on this exhibit in your own handwriting? A. Yes, it is.

Q. The date, the words "Sound Shingle Company" and your name are all in your own handwriting? A. Yes.

Trial Examiner Royster: Your answer is "Yes?"

The Witness: As to the date, yes, I believe it is.

Q. (By Miss Krug): Do you happen to recall what was torn off there? A. No, I don't.

Miss Krug: That is all. I have no further questions.

Trial Examiner Royster: That seems to be all, Mr. Butters. You are excused.

(Witness excused.)

Mr. Flood: Counsel, I propose for the sake of expedition [246] that you stipulate that those are official certificates of registration.

Miss Krug: Both of them?

Mr. Ward: One is a letter of transmittal.

Mr. Flood: One may be a letter of transmittal.

Miss Krug: This does not purport to be a certificate, Mr. Flood.

Mr. Ward: That is right. That is a letter of transmittal.

Mr. Flood: Mr. Hilbun gave me one and we also have one from the patent office.

Miss Krug: I am willing to stipulate that it is a certificate of trademark.

Mr. Constantine: Yes, I will stipulate to that.

Trial Examiner Royster: Well, that is Respondent's Exhibit No. 11 and it is stipulated that it is what it purports to be?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 11 for identification.)

Mr. Constantine: Is it offered?

Trial Examiner Royster: Not yet.

Mr. Flood: I will offer it.

Mr. Constantine: I will object.

Miss Krug: I will object.

Trial Examiner Royster: Let me see it. All right, Respondent's Exhibit No. 11 is rejected. [247]

(Thereupon the document heretofore marked Respondent's Exhibit No. 11 for identification, was rejected.)

[See page 201 of this printed Record.]

Mr. Flood: Out of the abundance of caution I should like to make an offer of proof in connection with it.

Trial Examiner Royster: All right.

Mr. Flood: I offer to prove through Exhibit No. 11 that the United Brotherhood of Carpenters

and Joiners of Indianapolis, Indiana, did on the 6th day of August, 1903, register their trademark with the Secretary of State of the State of Washington.

Trial Examiner Royster: All right, the offer of proof is rejected.

Mr. Flood: I will recall Mr. Martin.

JOHN E. MARTIN

previously sworn, testified as follows:

Re-Direct Examination

Q. (By Mr. Flood): Mr. Martin, I want to inquire a little farther into a subject raised by your testimony this morning. I understood you that in the latter part of December or early January you had two cars of shingles shipped from North Shore to some staining plant in Seattle?

A. Would you please repeat that again?

Q. Well, maybe I had better let you tell me what that transaction was. It just is not clear in my mind. [248]

A. What do you want me to tell you?

Q. What about those two carloads of shingles that you testified to this morning from North Shore to some plant in Seattle and that was then transshipped to North Shore's customers somewhere, which was the subject matter of the company's having shipped you the car on January 11th as a replacement therefor?

Mr. Constantine: This was gone all over once before, Mr. Examiner.

(Testimony of John E. Martin.)

Miss Krug: I will object to the form of the question.

Trial Examiner Royster: The objection is sustained. He has already testified about it.

Mr. Flood: You do not sustain it on the form of the question,—you sustain it on——

Trial Examiner Royster: That you are going over the same ground with the same witness.

Mr. Flood: I am afraid to say that I did not quite understand the testimony this morning and there is some difference between co-counsel as to what the effect of it was. I thought that I was entitled to clarify it.

Trial Examiner Royster: You have him on as your witness now. Now clarify it with the witness off the stand; if you still don't understand what he testified to then perhaps you can put him back on, but do not investigate your witness on the stand.

Mr. Flood: Well, I understand that he is an adverse witness.

Trial Examiner Royster: I understand that but that does not stop you from speaking to him.

Q. (By Mr. Flood): Well, it is correct then, is it not, that the carload that came in on January 11th, came in as a replacement?

Mr. Constantine: I object as a repetition of previous testimony.

Trial Examiner Royster: Well, it is, but I will let him answer. You may answer, Mr. Martin.

The Witness: Yes.

Mr. Flood: All right; that is all.

(Testimony of John E. Martin.)

Mr. Constantine: All right, I have no more questions.

Mr. Flood: Just a minute. [250]

* * * * *

Re-Direct Examination—(Continued)

Q. (By Mr. Flood): May I just ask you, Mr. Martin, to explain your testimony as I understood it yesterday where the car in question of January 11th was shipped to you by North Shore, North Shore as the consignor and consignee for transshipment to their customers when you had completed the grooving in connection with your testimony this morning and just a moment ago that that car came to you as your own property in replacement of former cars that had been shipped by North Shore?

Miss Krug: I will object to the form of the question.

Trial Examiner Royster: I will overrule the objection. Go ahead and explain it.

Q. (By Mr. Flood): Just explain it.

A. Just what.

Q. I want to hear your explanation.

A. You are getting me confused.

Mr. Constantine: I do object to that form of the question, "I want to hear your explanation of it," Mr. Examiner.

Trial Examiner Royster: Well——

Mr. Flood: I want to hear his testimony.

Trial Examiner Royster: There was some testimony by Mr. Martin to the effect, as I recall it,

(Testimony of John E. Martin.)

that the car which [253] came in on January 11th was a replacement for cars that earlier had been shipped for the account of North Shore. Is that correct, Mr. Martin?

The Witness: Well, if you want me to explain that for you——

Trial Examiner Royster: Yes.

The Witness: We had already shipped two cars from our own plant, that is we had grooved our own shingles; we had shipped those for the accounts of North Shore Shingle Company. Now, this car that came in on January 11th was the first car under our agreement for us to groove their shingles but this particular car that we received on January 11th would have also been grooved and shipped to North Shore Shingle Company's customers. Is that clear?

Trial Examiner Royster: Well, I will leave that up to Mr. Flood.

Mr. Flood: It was, however, a replacement?

The Witness: Well——

Q. (By Mr. Flood): It was or was not; now which was it?

A. Well, I really would not know whether you would call it a replacement or not. It would depend on how you look at it. It thought I explained it clear. What would you call it?

Q. Did the car come to you on a bill of lading from North Shore to you? [254]

A. Oh, sure, they all did. I mean all cars come in on bills of lading.

(Testimony of John E. Martin.)

Q. And then you were free to ship that car on a bill of lading from Sound Shingle to Perma Products in Chehalis, were you?

A. No, no, not when the car originally came in; not when the car was originally shipped to us. This was part of our contract to groove it and to reship it for North Shore.

Q. Do you have the bill of lading in your office?

A. Yes, sure, we have the bill of lading.

Mr. Flood: Then I ask, your Honor, that it be produced or ask for a subpoena.

Trial Examiner Royster: I do not think it is material but maybe I am wrong. I have already quashed the subpoena which would have called for that, and that is the ruling.

Mr. Flood: Which among other things would have called for that?

Trial Examiner Royster: Yes.

Mr. Flood: Do you for the record refuse us a subpoena and assign your reason for it?

Trial Examiner Royster: I will give you subpoenas all day long but I will quash them just as fast. Now, if you insist upon going through that procedure——

Mr. Flood: I would like to avoid any idle moments.

Trial Examiner Royster: Yes. [255]

Mr. Flood: But I do feel obliged to do the best I can to protect the record.

Trial Examiner Royster: Yes.

Mr. Flood: I think it is very material. So in

(Testimony of John E. Martin.)

lieu of that if you can announce for the record that you refuse a subpoena and if one were issued you would quash it upon, upon the ground, and then we will take advantage of the rule and ask it.

Trial Examiner Royster: Well, I will say this that if you were to ask for a subpoena I think that I would have to issue it to you but upon motion I would quash it immediately.

Mr. Flood: Well, may I ask then that the record show that we have asked for a subpoena duces tecum to produce the bills of lading in connection with the shipment, the carload shipment of January 11th and that the Examiner declined to issue one for the reason that if one were issued he would revoke and quash it, upon what ground?

Trial Examiner Royster: Well, I have already stated the ground.

Mr. Flood: Upon the ground that it is immaterial?

Trial Examiner Royster: Let the record show this, that I refuse to issue a subpoena duces tecum for the purpose, for I have already issued a subpoena duces tecum for that purpose, and I am not required to keep duplicating that action upon your request. [256]

Mr. Flood: And to make the record very clear about it, under Section 102.30 we request that as an aggrieved party the refusal to issue a subpoena be made a part of the record.

Trial Examiner Royster: Well, it is already part of the record, what you have said.

(Testimony of John E. Martin.)

Mr. Flood: I am just following the literal terms of the rules.

Trial Examiner Royster: And what I have said in connection with it.

Mr. Flood: That is all then. [257]

* * * * *

Trial Examiner Royster: On the record. Now, there is a question that has come up in respect to Exhibits No. 2 and 3, Mr. Flood. I understand that you intend now offering them if they have not earlier been offered?

Mr. Flood: Yes, the record shows that I have not offered them. I now move to offer them in evidence.

Mr. Constantine: I object to both of them.

Trial Examiner Royster: All right, they are rejected and will go into the rejected file.

(The documents heretofore marked Respondent's Exhibits No. 2 and 3 for identification, were rejected.)

[See pages 31-37 of this printed Record.]

Trial Examiner Royster: The record also shows some confusion between Respondent's Exhibit No. 1 and Respondent's Exhibit No. 9.

Mr. Constantine: May the record also show that Respondent's Exhibit No. 1 has been admitted as Respondent's Exhibit No. 9? [278]

* * * * *

Before officially closing the record, do you have an exhibit to introduce, Mr. Flood?

Mr. Flood: Yes, at this time I would like to have the official reporter mark the subpoena as Respondent's Exhibit No. 12.

(Whereupon the document above referred to was marked Respondent's Exhibit No. 12 for identification.)

Trial Examiner Royster: All right, the exhibit, Respondent's Exhibit No. 12 which is the subpoena duces tecum will be admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 12 for identification, was received in evidence.) [See page 201.]

Trial Examiner Royster: All right, there being nothing [280] further to come before the hearing officer the hearing is closed.

(Whereupon, at 3:00 o'clock p.m., Friday, April 25th, 1952, the hearing in the above-entitled matter was closed.)

[Endorsed]: No. 13768. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers Union, Respondents. Transcript of Record. Petition for enforcement of order of The National Labor Relations Board.

Filed: March 23, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit.

No. 13768

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WASHINGTON-OREGON SHINGLE WEAVERS'
DISTRICT COUNCIL and EVERETT
LOCAL 2580 SHINGLE WEAVERS UNION,
Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers Union, their agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Washington-Oregon Shingle Weavers' District Council, Chartered by the United Brotherhood of Carpenters and Joiners of America, Affiliated with the American Federation of Labor,

Everett Local 2580 Shingle Weavers Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L. and John E. Martin and Frank S. Barker, Co-partners doing business as Sound Shingle Co.," Case No. 19-CC-42.

In support of this petition the Board respectfully shows:

(1) Respondents are labor organizations engaged in promoting and protecting the interests of their members in the State of Washington, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on December 19, 1952, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, their agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondents, their agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 17th day of March, 1953.

NATIONAL LABOR RELATIONS
BOARD

/s/ By A. NORMAN SOMERS,
Assistant General Counsel

[Endorsed]: Filed March 19, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause]

STATEMENT OF POINT ON WHICH
PETITIONER INTENDS TO RELY

To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner
in the above proceeding, in conformity with the
rules of this Court, hereby states the following point
as that on which it intends to rely herein:

The Board correctly determined that respondents
violated Section 8 (b) (4) (A) of the Act by induc-
ing and encouraging the employees to refuse to work
on Canadian shingles.

Dated at Washington, D. C., this 17th day of
March, 1953.

/s/ A. NORMAN SOMERS,
Assistant General Counsel
National Labor Relations Board

[Endorsed]: Filed Mar. 19, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause]

ORDER TO SHOW CAUSE

United States of America, ss:

The President of the United States of America:

To Washington-Oregon Shingle Weavers' District Council, Eitel Bldg., Seattle, Wash; Everett Local 2580 Shingle Weavers Union, Labor Temple, Everett, Wash., and John E. Martin & Frank S. Barker, co-partners, d/b/a Sound Shingle Co., Att: Mr. John E. Martin, Delta St., Marysville, Washington.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)). you and each of you are hereby notified that on the 19th day of March, 1952 a petition of the National Labor Relations Board for enforcement of its order entered on December 19, 1952 in a proceeding known upon the records of said Board as "In the Matter of Wash.-Oregon Shingle Weavers' Dist. Coun., Chartered by the United Bro. of Carpenters & Joiners of America, Affiliated with the American Fed. of Labor, Everett Local 2580 Shingle Weavers Union, United Bro. of Carpenters & Joiners of America, AFL, and John E. Martin & Frank S. Barker, co-partners, d/b/a Sound Shingle Co., Case No. 19-CC-42," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said

United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March in the year of our Lord one thousand, nine hundred and fifty-three.

[Seal] /s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

Returns on Service of Writs attached.

[Endorsed]: Filed April 6, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause]

ANSWER AND CROSS-PETITION OF
RESPONDENT

Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers' Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

To: The Honorable Judges of the United States Court of Appeals, for the Ninth Circuit:

The Washington-Oregon Shingle Weavers' District Council, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, hereinafter referred to as the "District Council," and Everett Local 2580 Shingle Weavers' Union, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and hereinafter referred to as "Local 2580," answering the petition of the National Labor Relations Board, hereinafter called the "Board," for the enforcement of its order against the respondents herein, and further petitioning this court to review and vacate such decision and order made and entered by the Board in a proceeding instituted upon a complaint issued against the respondents herein, allege as follows:

I.

Admit the allegations of petitioner as set forth in the first paragraph on page one thereof.

II.

With respect to paragraph (1) page one and page

two of the petition, respondents admit that they are labor organizations engaged in promoting and protecting the interest of their members in the state of Washington, within this judicial circuit; respondents deny that any unfair labor practices have occurred within this judicial district and deny that this court has jurisdiction of the subject matter of the parties herein otherwise than to take cognizance of the matter as provided under Sections 10 (e) and (f) for the purpose of reviewing the order and decision of the Board referred to and to set aside and dismiss the proceeding.

III.

Respondents admit the issuance by the Board of its order and decision, accompanied by its statement of findings of fact and conclusions of law; further that the Board's decision and order was served upon the respondents as alleged in paragraph (2); but deny the legal validity of the Board's findings, conclusions, order and decision.

IV.

Respondents admit paragraph (3) except that respondents deny that the Board filed with this court a transcript of the entire record of the proceedings before the Board.

And for further answer, affirmative defense and cross-petition, these respondents respectfully represent, allege and show:

I.

That the Washington-Oregon Shingle Weavers' District Council is a labor organization chartered by

the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor. That Everett Local 2580 Shingle Weavers' Union, is a labor organization chartered by the United Brotherhood of Carpenters and Joiners of America, A. F. of L., and a member of the Washington-Oregon Shingle Weavers' District Council. That on June 11, 1952 Everett Local 2580 was the collective bargaining agent and representative of the employees of John E. Martin and Frank S. Barker, copartners, doing business as the Sound Shingle Co. That at said time all of the employees of the Sound Shingle Co. were members of Everett Local No. 2580.

II.

That the constitution, by-laws and charter of the United Brotherhood of Carpenters and Joiners of America and the constitution, by-laws and charter of the Washington-Oregon Shingle Weavers' District Council and the constitution, by-laws and charter of Everett Local No. 2580, constitute contracts between each of said organizations and their membership. That on June 11, 1952, all of the employees of Local No. 2580 were bound by the aforesaid contracts and by their oath of membership to refuse to work on, process, deal in, buy or sell any product of any manufacturer not bearing the Union label of the United Brotherhood of Carpenters and Joiners of America, A. F. of L.

III.

That on June 11, 1952 the Sound Shingle Co. was obligated to and had a right to affix the Union label

to all products produced by members of Local No. 2580 at the Sound Shingle Co.

IV.

That on June 11, 1952 three Union members of Local No. 2580 walked off their jobs at the Sound Shingle Co., ten minutes after they learned that their employer wanted them to work on shingles produced in a Canadian mill, because the shingles did not bear the Union label. The Washington-Oregon Shingle Weavers' District Council and Local No. 2580 have a constitutional right to induce, encourage or exhort, either in writing or orally, any of its members to refuse to work on goods of any person if such goods do not bear the Union label. That such right is vouchsafed the District Council and the Local union by reason of their contracts with each of their members and by reason of the first amendment to the Federal Constitution and Section 7, 13 and 8 (c) of the National Labor Relations Act as amended.

V.

That the Washington-Oregon Shingle Weavers' District Council and Everett Local No. 2580 Shingle Weavers' Union, have at no time since their inception been authorized to organize or charter any organization of employees of any employer engaged in the production of shingles or shakes in the Dominion of Canada. That the Washington-Oregon Shingle Weavers' District Council and Everett Local No. 2580, Shingle Weavers' Union have at no time since their inception engaged in a labor dispute with any Canadian employer or with the em-

ployees of any Canadian employer, as those terms are used in the National Labor Relations Act as amended.

VI.

That on December 19, 1952, the National Labor Relations Board entered its order herein, which provides in substance that the respondents are required to refrain from exhorting, inducing or encouraging their members from working on or processing or otherwise handling the products of North Shore Shingle Co., Ltd., or other Canadian shingle manufacturers. That said order deprives the respondents of freedom of speech, and freedom of press, and impairs the obligations of respondents under their contracts by and between themselves and their membership, as heretofore described herein, all in violation of the First, the Fifth and Fourteenth amendments to the Federal Constitution of the United States, and said order is beyond the power and the jurisdiction of the National Labor Relations Board.

VII.

That the findings of fact, conclusions of law, decision and order of the National Labor Relations Board herein are arbitrary and capricious in that they are based on rulings admitting and rejecting evidence wholly at variance with established rules of law and evidence under both the Administrative Procedure Act and the rules of evidence governing United States district courts. To all of such rulings, respondents excepted at the time of the hearing, and upon the filing of the intermediate

report of the Trial Examiner. That said rulings of the Trial Examiner are so arbitrary and capricious as to deprive these respondents of due process of law under the Fifth amendment to the Constitution of the United States, and in violation of section 7, 8 (c) and 13 of the National Labor Relations Act as amended.

VIII.

That the occurrence complained of on January 11, 1952, when three employees of Sound Shingle Co., members of respondent Unions, ceased work, refusing to handle one carload of shingles for the reason that they did not bear the Union label, constituted an isolated, sporadic event unrelated to any of their prior or subsequent conditions of employment and that the dispute, arising as a result of their temporary cessation of work settled, composed and adjusted and did not have and does not have any detrimental effect upon labor relations between employer Sound Shingle Co. and its employees, members of respondent Unions, and that there exists nothing to invoke the jurisdiction of the National Labor Relations Board or the jurisdiction of this court to enforce any order of the National Labor Relations Board with respect thereto, or specifically to enforce the order of the Board dated December 19, 1952.

IX.

That the entire controversy here in question is moot. Any and all disputes between the Sound Shingle Co. and respondents arising or growing out of the events and situation occurring on January 11,

1952, have been completely resolved. The dispute occurring on January 11, 1952, has long since ceased. It no longer exists, and the question involved in this enforcement proceeding is utterly abstract and academic. The controversy, if any, relates to a wholly past event and does not have and cannot have any bearing upon collective bargaining relationships between the charging employer and these respondent Unions, for the reason that the employer has been operating without cessation since April of 1952 at full capacity, under a collective bargaining contract whereby all of his employees engaged in production and maintenance both in the shingle mill, the staining and the glue plant are members of respondent Unions, and respondents' motion to dismiss upon this ground, addressed to the National Labor Relations Board, should by that Board have been granted.

Wherefore, having answered and having by cross-petition asserted facts and grounds relied upon for the purpose of supporting respondents' cross-petition to set aside and dismiss the proceeding herein, these respondents pray:

1. That this court cause notice of the filing of this answer and cross-petition to be served upon the remaining respondents and upon the Board, the petitioner herein.

2. That this court review the finding, conclusions, decision and order of the Board herein and that it vacate and set aside such order in its entirety and that it order the Board to dismiss the

complaints against these respondents and deny any enforcement thereof whatsoever.

3. That this court, in the exercise of its jurisdiction, grant this respondent such other and further relief as the equities of the cause may be deemed by this court to warrant.

Dated at Seattle, Washington, this 20th day of April, 1953.

/s/ GEORGE E. FLOOD and
/s/ GEORGE J. TOULOUSE, JR.,
and
/s/ FRANCIS X. WARD,
Attorneys for Respondents.

[Endorsed]: Filed Apr. 22, 1953. Paul P. O'Brien,
Clerk.

[Title of U.S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RE-
SPONDENTS AND CROSS-PETITIONER
INTEND TO RELY ON APPEAL

To: The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit.

Washington-Oregon Shingle Weavers' District Council and Everett Local No. 2580 Shingle Weavers' Union, A. F. of L., respondents in the above-entitled proceeding, and cross-petitioners therein, in conformity with the rules of this Court, hereby state the following points on which they intend to rely herein:

1. The Board erred in determining that respondents violated Section 8 (b) (4) (a) of the Act by engaging in concerted activities in inducing and encouraging their own members where the object of respondents' inducement, encouragement and concert of action was for the purpose of protecting respondents' interest in their Union label and for the purpose of enjoying their contract rights existing by and between respondents and their membership, and by and between the respondents and the employer herein questioned.

2. The Board erred in failing to find that any and all of the conduct of the respondents herein, as disclosed in the record, consisting of communications, publications and advocacy of respondents to their own membership, was not protected, concerted activity within the meaning of Section 7 of the Act, and was not privileged conduct, communication, publication and advocacy within the meaning of Section 8 (c) and Section 13 of the Act, and of the First Amendment to the Constitution of the United States; and the Board's finding communications, publications and advocacy by and between respondents and its members is evidentiary of a violation of 8 (b) (4) (a) of the Act, is beyond the jurisdiction of the Board, and this is particularly true where respondents' conduct, communications, publications and advocacy are not related to or contemporaneous with an existing labor dispute.

3. The Board erred in affirming the findings of fact, conclusions of law, intermediate report, and recommendations of the Trial Examiner and in en-

tering its order and decision dated December 19, 1952. Said findings of fact, conclusions of law and recommendations, decision and order are arbitrary and capricious and not supported by substantial evidence on the record considered as a whole.

4. The Board erred in failing to find that the only dispute shown by the record was between the employees of Local No. 2580 and their immediate employer, the Sound Shingle Company.

5. The Board erred in failing to find that the respondents had no labor dispute with or any relations with North Shore, Limited, or its employees or any other Canadian employer or manufacturer or their employees.

6. The Board erred in failing to find that the members of respondent union, Local No. 2580, who left their work on January 11, 1952, did so voluntarily and without any coercion from respondents.

7. The Board erred in finding that the respondents had or now has a policy to refuse to work on shingles of Canadian manufacture.

8. The Board erred in finding that communications, publications or advocacy exchanged between respondents and its own members involved "threats of reprisal or promise of benefit" to its own members.

9. The Board erred in failing to find that Article VI, paragraph (c) of the collective bargaining agreement existing by and between respondents and the Sound Shingle Company contemplated that respondents' members were not required to work on

products not bearing respondents' label or on products not produced under "fair" conditions.

10. The Board, in its findings of fact, conclusions of law and decision, erred in refusing to grant respondents' motion for dismissal, upon the ground that the controversy herein is entirely moot and has long since ceased and terminated and no existing justiciable issue or controversy exists between the parties hereto upon which this court's order, if any, could operate.

11. The Trial Examiner's order suppressing respondents' request for a subpoena duces tecum, directed to John N. Martin and Sound Shingle Company at the time of the hearing, affirmed as it was by the Board, was prejudicial error, in that the evidence and records called for by such subpoena related to the use or misuse of respondents' union label, which constituted the subject matter of the only active dispute between respondents and Sound Shingle and was therefore germane to the right of respondents to act in concert under Sec. 7 of the Act.

12. These respondents further rely upon the exceptions set forth in their statement of exceptions to certain findings and rulings of the Trial Examiner upon the hearing herein, which exceptions were by the Trial Examiner and the Board overruled, a copy of which are a part of the transcript filed herein, on the ground that such findings and rulings are erroneous and contrary to law.

13. That the Board erred in its findings, conclusions and decision holding that respondents' con-

duct constituted a secondary boycott against their immediate employer Sound Shingle, in furtherance of an alleged primary boycott directed against some alleged anonymous Canadian manufacturer with whom respondents had no business or collective bargaining relationship whatsoever; that on the contrary the dispute here in question was one arising exclusively between respondents and their members on the one hand and their immediate employer Sound Shingle on the other, and was primary rather than secondary.

Dated at Seattle, Washington, this 20th day of April, 1953.

/s/ GEORGE E. FLOOD and
/s/ GEORGE TOULOUSE, JR.,
and
/s/ FRANCIS X. WARD,
Attorneys for Respondents.

[Endorsed]: Filed Apr. 22, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING OF ANSWER
AND CROSS-PETITION

of Respondents' Washington-Oregon Shingle Weavers' District Council and Everett Local 2580 Shingle Weavers' Union, A. F. of L.

To: The National Labor Relations Board, and A. Norman Somers, Assistant General Counsel. Mr. Thomas P. Graham, Jr., Regional Director, National Labor Relations Board, Nineteenth Region, Seattle, Washington. Mary Ellen Krug, c/o McMicken, Rupp & Schweppe, Attorneys for John E. Martin and Frank S. Barker, co-partners d/b/a Sound Shingle Co.

You, and each of you, pursuant to Title 29 U. S. C. A., Section 160(e) (f), are hereby notified that on the 20th day of April, 1953, an answer and cross-petition of Washington-Oregon Shingle Weavers' District Council and Everett Local No. 2580 Shingle Weavers' Union, A. F. of L., the respondents and cross-petitioners herein, was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit, in which answer and cross-petition these respondents seek to set aside the order of the National Labor Relations Board filed herein dated December 19, 1952, and to procure an order of dismissal thereof, copy of which answer and cross-petition is attached hereto.

You are notified and requested to appear and plead with respect to said answer and cross-petition

within such time as may be provided for by law, and in default thereof the Court of Appeals for the Ninth Circuit will be asked to enter such decree as it deems just and proper in the premises.

Dated this 20th day of April, 1953, at Seattle, Washington.

/s/ GEORGE E. FLOOD and

/s/ GEORGE J. TOULOUSE, JR.,

and

/s/ FRANCIS X. WARD,

Attorneys for Respondents and
Cross-Petitioners.

Affidavit of service by mail attached.

[Endorsed]: Filed Apr. 22, 1953. Paul P. O'Brien,
Clerk.

No. 13768

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**WASHINGTON-OREGON SHINGLE WEAVERS' DISTRICT
COUNCIL AND EVERETT LOCAL 2580 SHINGLE
WEAVERS' UNION, A. F. L., RESPONDENTS**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

A. NORMAN SOMERS,

Assistant General Counsel,

BERNARD DUNAU,

JAMES A. RYAN,

Attorneys,

National Labor Relations Board.

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13768

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**WASHINGTON-OREGON SHINGLE WEAVERS' DISTRICT
COUNCIL AND EVERETT LOCAL 2580 SHINGLE
WEAVERS' UNION, A. F. L., RESPONDENTS**

***ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD***

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*), for enforcement of its order issued on December 19, 1952, against Washington-Oregon Shingle Weavers' District Council, hereinafter referred to as the District Council, and Everett Local 2580 Shingle Weavers' Union, hereinafter referred to as Local 2580, following the usual proceedings under Section 10 of the Act. The Board's decision and

order (R. 239–250, 203–216)¹ are reported in 101 N. L. R. B. No. 203. This Court has jurisdiction of the proceedings under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at Marysville, Washington.²

STATEMENT OF THE CASE

The unfair labor practices in this case pertain to the secondary boycott called by respondents against the Sound Shingle Company, herein called the Company. The subsidiary findings of fact, which are substantially undisputed, may be summarized as follows:

I. The Board's findings of fact

The Company commenced its operations at Marysville, Washington, in January 1951 (R. 205; 263–264). Shortly thereafter, Paul M. Sarrett, field representative of the District Council, called on John E. Martin, a company partner, and warned him that the District Council would not permit the Company to use Canadian shingles and that if it persisted in doing so the plant would have to close (R. 205; 264–265). The “Shingle Weaver,” official publication of the District

¹ References to portions of the printed record are designated “R.” References preceding a semicolon are to the Board’s findings, and references following a semicolon are to the supporting evidence.

² The Sound Shingle Company, injured by the unfair labor practices here involved, is engaged at Marysville, Washington, in the business of manufacturing and processing shingles and shakes. During the year 1951, the Company shipped to points outside the State of Washington products valued in excess of \$42,000. No question as to the Board’s jurisdiction is presented (R. 204–205; 320).

Council, had a few months earlier announced a policy to eliminate all “unfair Canadian or other nonunion” shingles from the markets in the United States (R. 205–206; 12–17). On February 2, 1951, the Company entered into a contract with the District Council and Local 2580 (R. 206; 39–62).

Nearly a year later, on January 11, 1952, the Company received a carload of shingles from the North Shore Shingle Company, a Canadian organization, with which it had a contract to groove shakes (R. 206; 265–266). This car was opened by Jack Butters, company superintendent, assisted by John A. Martin, steward for Local 2580, and other employees (R. 206; 361–362). The men observed immediately that the shingles bore no union label (R. 206; 362). Thereupon, Martin remarked, “they are B. C. [British Columbia] shingles and we won’t do nothing with them. We will let them sit there” (R. 206; 362–363). After Martin’s remarks, all the employees left the plant and operations had not been resumed at the time of the hearing (R. 206; 382).

On January 13, two days after the plant closed down, John E. Martin, company partner, met with Sarrett, District Council field representative. Martin asked Sarrett why the Company could not use Canadian shingles (R. 206; 270–272, 335, 378–379). Sarrett replied that Fred Baker, a member of the District Council from Oregon, was more familiar with the problem in question (R. 206; 272, 335–336, 379). Baker then came in, and when he was asked to give an explanation he stated that Canadian shingles were

unfair because Canadian employees did not have the same wages, hours, and working conditions as employees in the United States (R. 206-207; 273-274, 336). Baker went on to say that until such time as the Canadian employees enjoyed the same working conditions as their fellow employees in the United States the District Council would oppose the use of Canadian shingles anywhere in the United States (R. 206-207; 273-274, 336). Martin then explained that the shingles which the employees had refused to process were manufactured by the North Shore Shingle Company, which had a contract with a CIO union (R. 207; 274-275, 337). Sarrett responded that it made no difference as the District Council did not recognize the CIO union in Canada (R. 207; 274-275, 337). Sarrett continued that the Canadian employers did not have a contract with the District Council, and that the working conditions of their employees were unlike those found in the United States (R. 207; 276, 337). Sarrett then stated: "We have been working on them for quite some time to get their standard up to ours, and until such time as we can get the mills to sign a contract with us and agree to the same wages, hours, and working conditions, we absolutely won't allow you to run them" (R. 207; 276).

On the following day, January 14, Martin conferred with Arthur Brown, president of the District Council, Glenn Uttley, president of Local 2580, and John A. Martin, steward of the Local (R. 207; 277-278, 339). When Martin indicated that he wanted to resume operations at the plant, Brown replied that the only

way he could accomplish that would be for him to process his own shingles or to buy those made in the United States (R. 207-208; 279-280, 340). Brown asserted that he would never allow Martin to process Canadian shingles, and that if Martin intended to use Canadian shingles he better move his plant as he would never be permitted to work on them there (R. 208; 279-280, 340-341). Brown referred to the efforts he had made to organize the Canadian plants in order to secure for the Canadian employees the same working conditions as those found in the United States (R. 208; 281). He indicated that one Canadian employer was agreeable to the idea as he was anxious to find a market in California for his products (R. 208; 281).

At this juncture, Martin, the company partner, asked Brown if he was calling the employees off the job (R. 208; 282-283, 341-342). Brown replied that he was not, but that the employees refused to work on Canadian shingles (R. 208; 282-283, 341-342). Martin then asked Steward Martin if Brown's statement was accurate (R. 208; 282-283, 341-342). Steward Martin thereupon turned to Brown and stated: "The reason that we refuse to work on Canadian shingles is because you ordered us not" (R. 208; 282, 341-342). Brown then remarked: "Well, O. K. For the record, let us have it that way. We absolutely won't allow your boys here to work on Canadian shingles" (R. 208; 282, 341-342). Brown, in an article appearing in the January 1952 edition of the "Shingle Weaver," asserted again the District Coun-

cil's determination to secure favorable working conditions in Canada before permitting the Canadian products to be processed in the United States (R. 208; 17-18).

A few weeks after the plant closed, employees Rosenbach and Bockwinkel questioned Brown about returning to their positions (R. 208-209; 370-371, 375). Brown replied that if they did return they would be placed on the black list as the Company was using unfair shingles (R. 209; 370-371, 375).

II. The Board's conclusions of law

On the basis of the foregoing facts the Board concluded that, in violation of Section 8 (b) (4) (A) of the Act, the District Council and Local 2580 induced and encouraged the Company's employees to refuse to work on Canadian shingles, an object thereof being to cause the Company to cease using or otherwise dealing in the products of North Shore Shingle Company, Ltd., and other Canadian manufacturers.

III. The Board's order

The Board's order (R. 248-249) requires the District Council and Local 2580 to cease and desist from engaging in or inducing or encouraging their members to engage in a strike or a concerted refusal to perform services for the Company or any other employer where an object thereof is to require the employer to cease doing business with the North Shore Shingle Company or other Canadian shingle manufacturers. Affirmatively, the Board's order directs both the Dis-

trict Council and Local 2580 to give notice to members of Local 2580 that they are free to work for the Company and that such employment will not prejudice their rights in either organization, and to notify the Company that its employees will not be induced or encouraged to engage in a strike or a concerted refusal to work upon products of the North Shore Shingle Company or other Canadian shingle manufacturers for the purpose of requiring the Company to cease doing business with any Canadian shingle manufacturer. The Board's order also requires the posting of appropriate notices (R. 249-250).

SUMMARY OF ARGUMENT

Substantial evidence on the whole record supports the Board's findings, first, that respondents induced the Company's employees to refuse to work on Canadian shingles, and second, that an object of this refusal was to require the Company to cease dealing in the products of North Shore Shingle Company and to that extent to cease doing business with it. The means thus employed and the end sought were precisely those prohibited by Section 8 (b) (4) (A) of the Act. It constituted subjecting the Company to a cessation of work, not because of dissatisfaction by its employees with their own working conditions, but because of dissatisfaction with the working conditions of the employees of another employer with whom the Company had no connection other than as purchaser of its product. Section 8 (b) (4) (A) was aimed at eliminating this sort of "product boycott."

ARGUMENT

The Board properly found that the District Council and Local 2580, by inducing and encouraging the Company's employees to refuse to work on Canadian shingles, with an object of requiring the Company to cease dealing in shingles of Canadian manufacturers, engaged in an unfair labor practice prohibited by Section 8 (b) (4) (A) of the Act

Section 8 (b) (4) (A) of the Act, in relevant part, provides that:

(b) it shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * work on any goods * * * where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using * * * or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

It is apparent that conduct is proscribed by Section 8 (b) (4) (A) when it meets two conditions. First, the Union must engage, or induce employees to engage, in a strike or a concerted refusal to work in the course of their employment. Second, an object of this conduct must be to require any person to cease dealing in the product of any other person or otherwise doing business with him. In this case, respondent's conduct fell within the ban of the requirements of Section 8 (b) (4) (A), because the means employed met the first condition and the end sought met the second.

Thus—as to the means employed to induce the refusal to work—upon the arrival of a carload of shingles of Canadian manufacture, the Shop Steward for Local 2580 precipitated the cessation of work by remarking, “They are B. C. [British Columbia] shingles and we won’t do nothing with them. We will let them sit there” (*supra*, p. 3). The union-induced character of the refusal to work was later confirmed when the steward stated to the president of the District Council, “The reason that we refuse to work on Canadian shingles is because you ordered us not,” and the president concurred, “Well, O. K. For the record, let us have it that way. We absolutely won’t allow your boys to work on Canadian shingles” (*supra*, p. 5). Thereafter, the president threatened two employees with blacklisting should they return to work for the Company so long as it was using Canadian shingles (*supra*, p. 6). Accordingly, there can be no question concerning the substantiality of the evidence to support the Board’s finding that the cessation of work was induced by respondents.

The second branch of the offense—the object sought by the refusal to work—was established by equally ample evidence. The policy adopted by respondents was to eliminate Canadian shingles from markets in the United States because the conditions of their manufacture were considered inferior to those prevailing in the United States (*supra*, p. 4). Labor conditions were deemed unsatisfactory even if the Canadian employer was under contract with a CIO union (*supra*, p. 4); only a labor agreement with the

District Council was considered to be adequate assurance of satisfactory working conditions (*supra*, p. 4). Accordingly, Canadian shingles would be classed unfair by respondents, and their use would be interdicted, until the Canadian manufacturer agreed to “sign a contract with us” (*supra*, p. 4). In implementation of this policy, when the Company received a carload of shingles from North Shore Shingle Company, a Canadian employer said to be under contract with a CIO union, respondents refused to countenance the Company’s use of them and induced the Company’s employees not to work on them (*supra*, p. 3). The Board therefore properly concluded that the cessation of work induced by respondents had as its forbidden objective to require the Company “to cease using the products” of North Shore and, “to that extent, to cease doing business with it” (R. 243).³

It is therefore clear that respondents violated Section 8 (b) (4) (A), for the means they employed and

³ Respondents’ illegal objective was proved in part by articles appearing in their official organ, the “Shingle Weaver,” publicizing respondents’ policy (*supra*, pp. 2–3, 5–6). Respondents contend that reception of this evidence contravened Section 8 (c) of the Act, which states that “expressing of any views, argument, or opinion * * * shall not constitute or be evidence of any unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit.” Pronouncements constituting an integral part of an illegal course of conduct are not safeguarded by Section 8 (c). As explained in *I. B. E. W. v. N. L. R. B.*, 341 U. S. 694, 704–705, “The remedial function of § 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in § 8 (b) (4). The general terms of § 8 (c) appropriately

the end they sought were precisely those contemplated by that section. It constituted the exertion of pressure on the Company, through inducing its employees to withhold their labor, merely because the working conditions of the employees of another employer were considered unsatisfactory. It is this involvement of a neutral employer in a controversy not his own which Section 8 (b) (4) (A) condemns. *N. L. R. B. v. Denver Building & Construction Trades Council*, 341 U. S. 675; *I. B. E. W. v. N. L. R. B.*, 341 U. S. 694; *Local 74 v. N. L. R. B.*, 341 U. S. 707; *N. L. R. B. v. United Brotherhood of Carpenters & Joiners*, 184 F. 2d 60 (C. A. 10), certiorari denied, 341 U. S. 947; *N. L. R. B. v. Denver Building & Construction Council*, 193 F. 2d 421 (C. A. 10); *N. L. R. B. v. Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584 (C. A. 2).

Respondents claim, however, that they did not involve the Company in a quarrel not its own. As phrased by respondents, “Their quarrel * * * was immediately and directly with their employer [the Company], and with no one else whatsoever,” and the pressure exerted on the Company was in de-

give way to the specific provisions of § 8 (b) (4).” In any event, even if the articles were erroneously received, the remaining evidence is ample to support the Board’s findings.

To the extent that respondents claim that their inducement of the Company’s employees not to work was accomplished by the uncoercive expression of views, and therefore safeguarded by Section 8 (c), *I. B. E. W. v. N. L. R. B.*, 341 U. S. 694, 700–705, likewise settles this contention contrary to respondents’ position. In any event, the inducement directed to the Company’s employees took the form of instructions and threats rather than persuasion (*supra*, p. 9).

fense of “their basic fundamental right to decline to work upon nonunion, nonlabel or unfair products.”⁴ The short answer to respondents’ contention is that Section 8 (b) (4) (A) undercuts the assumptions on which they are proceeding. An employer may no longer be subjected to a cessation of work by a union merely because the employer uses a product deemed objectionable by virtue of the working conditions which prevail at the original place of the product’s manufacture. *Wadsworth Building Co.*, 81 N. L. R. B. 802, 805–806, enforced, 184 F. 2d 60 (C. A. 10), certiorari denied, 341 U. S. 947; *N. L. R. B. v. Denver Building & Construction Trades Council*, 193 F. 2d 421 (C. A. 10). An employer may not be made a party to a dispute merely because he buys from, is the subcontractor of, or otherwise does business with another employer whose working conditions a union finds unsatisfactory. *N. L. R. B. v. Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 587 (C. A. 2); *N. L. R. B. v. Denver Building & Construction Trades Council*, 341 U. S. 675, 689–690.

Thus, the Senate Report, after setting forth the general objective of Section 8 (b) (4) (A) to forbid secondary boycotts, exemplified the forbidden practice by a concrete illustration (S. Rep. No. 105, 80th Cong., 1st sess., 22, in 1 Leg. Hist. 428):⁵

[It is] an unfair labor practice for a union to engage in the type of secondary boycott that

⁴ Respondents’ brief to the Board, pp. 10–11.

⁵ “Leg. Hist.” refers to the two volume edition of “Legislative History of the Labor Management Relations Act, 1947,” Govt. Print. Off. (1948).

has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See testimony of R. S. Edwards vol. 1, p. 176 *et seq.*;⁶ *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797.)

This union attitude, which forbade the use of material at the point of installation because of the character of its manufacture elsewhere, was summarized by Senator Taft to be: “We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City.” (93 Cong. Rec. 4199, in 2 Leg. Hist. 1107.) The identification of the buyer of a product with the objectionable character of its manufacture elsewhere—the evil apprehended by Congress—was further illustrated by Senator Taft (93 Cong. Rec. 4199, in 2 Leg. Hist. 1107–08; see also 93 Cong. Rec. 3838, in 2 Leg. Hist. 1012):

⁶“ * * * The boycott we are objecting to operates like this: The A. F. of L. International Brotherhood of Electrical Workers controls the labor that installs electrical construction materials of all kinds. This IBEW refuses to install and brings pressure on contractors and wholesalers to prevent them from handling any of these electrical construction materials unless they have been manufactured by IBEW labor *in the original plants.*” [Emphasis supplied.] 1 *Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., 176–177. As explained by the Second Circuit during its consideration of the case, the labor weapon involved was “refusal to work upon disfavored goods.” *Allen Bradley Co. v. Local Union No. 3*, 145 F. 2d 215, 219 (C. A. 2), reversed, 325 U. S. 797.

All over the United States, teamsters are saying, "We will not handle this lumber, because it is made in a plant where a CIO union is certified." * * *

Likewise, * * * all over the United States, carpenters are refusing to handle lumber which is finished in a mill in which CIO workers are employed, or, in other cases, in which American Federation of Labor workers are employed.

Senator Taft concluded by condemning the view "that if other workers do not like the way some employer is treating his employees, they can promote strikes in any other plant which happens to be handling the products of the plant whose management the workers do not like." (93 Cong. Rec. 4199, in 2 Leg. Hist. 1108.)

Senator Taft had prefaced these illustrations and his conclusion with the following remarks explaining the purpose of Congress to insulate the buyer of a product from conscription into quarrels concerning its manufacture (93 Cong. Rec. 4198, in 2 Leg. Hist. 1107):

Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, "We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions." Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. There is no reason that I can see why we should

make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that.

In this case, therefore, it is abundantly clear that the Union could not lawfully subject the Company to a cessation of work merely because the Company bought Canadian shingles to which the Union objected on the ground that they were manufactured under employment conditions assertedly inferior to those existing in the United States. It makes no difference whether or not the Union's conduct be thought to have a worthwhile objective. As Senator Taft explained, Section 8 (b) (4) (A) draws no distinction between "good secondary boycotts and bad secondary boycotts"; it condemns all. 93 Cong. Rec. 4198, in 2 Leg. Hist. 1106; *N. L. R. B. v. Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 586-587 (C. A. 2). As he further explained, "I do not see how we can distinguish between a plant employing union labor and a plant employing nonunion labor, or between a plant paying good wages and a plant paying poor wages, or between a plant employing CIO labor and a plant employing AFL labor." 93 Cong. Rec.

4199, in 2 Leg. Hist. 1108. Accordingly, the conditions of employment which actually prevailed in the plants of Canadian manufacturers producing shingles are immaterial.

Respondents contend, further, that it was not shown that they had a current, concrete controversy with North Shore Shingle Company, the Canadian employer whose shingles the Union forbade the Company to use; therefore, it is argued, it has not been established that the cessation of work by the Company's employees was in furtherance of a dispute between the Union and North Shore. The Board correctly concluded that (R. 244): "We do not believe that, as to the type of conduct now before us, Section 8 (b) (4) (A) contemplates the existence of an active dispute, over specific demands, between the union and the producer of goods under union interdict." North Shore was within the class of the Canadian employers producing shingles against whom respondents' policy was directed. The implementation of the policy may not yet have reached the stage of a direct demand upon North Shore. But the gist of the offense is to subject an employer to a cessation of work merely because he buys the product of a disfavored producer. The hurt to the buyer is the same—he is as much embroiled in a dispute not his own—whatever the stage, scope, or degree of controversy between the union and the disfavored producer. Accordingly, from the viewpoint of the interest Section 8 (b) (4) (A) is designed to protect, the critical inquiry is whether the cessation of work caused by the union stems from the employees' dissatisfaction with

their own working conditions or whether it has a basis in dissatisfaction with the working condition of the employees producing a product with which their employer has no connection other than as a purchaser. Considered in this light, it is clear that respondents' conduct in this case violated Section 8 (b) (4) (A) of the Act.

Several subsidiary contentions may be briefly noted:

1. It is urged that because North Shore Shingle Company is a Canadian corporation, it is not "any other producer, processor, or manufacturer" or "any other person" whom the Union may not force the Company, a domestic enterprise, to cease doing business with within the meaning of Section 8 (b) (4) (A). As the Board held, however, while it "does not have jurisdiction over foreign manufacturers as such, it does have jurisdiction over unfair labor practices occurring in this country and affecting foreign commerce" (R. 243). Neither by the text of Section 8 (b) (4) (A), nor by related definition (Section 2 (1)), do the words "any other producer, processor, or manufacturer" or "any other person" have a limitation based on national origin. Furthermore, the channels of commerce which union unfair labor practices have "the intent or necessary effect of burdening or obstructing" (Sec. 1, par. 4), and which the Act is designed to keep open, include "trade * * * between any foreign country and any State" (Sec. 2 (6)). Finally, it is the domestic employer who is safeguarded from the secondary boycott and his interest in not being involved in a quarrel not his own is the

same whether the disfavored goods are purchased from an American or a Canadian producer. In short, so long as the secondary boycott occurs in this country, it is immaterial that the reason for it arises elsewhere. *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N. W. 2d 94, 102–104.

2. Respondents claim that the cessation of work was not caused by the Company's purchase of Canadian shingles but by the Company's intention to place respondents' union label on the finished product contrary to respondents' policy of not affixing their label to any finished product made up in part of goods considered unfair by them. Without doubt respondents are entitled to protest any unauthorized use of their union label. The trouble with respondents' contention is that there is no evidence or offer of proof sufficient even to suggest that apprehended misuse of their union label was in any part the reason for the cessation of work they induced.⁷ Moreover, even if it were established that this did contribute to the cessation of work, it is at the least clear that a substantial object of the cessation was to induce the Company not to deal in Canadian shingles. This being so, Section 8 (b) (4) (A) has been violated, for it is enough that this was "an object" of the cessation; it "is not necessary that [it be] the *sole* object. * * *" *N. L. R. B. v. Denver Building & Construction Trade Council*, 341 U. S. 675, 689.

⁷ Thus, on February 10, 1951, almost a year before the cessation of work, the Company and respondents agreed that the union label should remain respondents' property with the right to recall it at any time, a right which they never chose to exercise (R. 212; 198).

3. Respondents rely upon *Rabouin v. N. L. R. B.*, 195 F. 2d 906 (C. A. 2), affirming 87 N. L. R. B. 972. This decision correctly holds that Section 8 (b) (4) (A) reaches only secondary boycotts and does not abridge a union's right to engage in a primary strike. 195 F. 2d at 912. But nothing in this distinction, nor in its appropriate application to the circumstances of that case,⁸ remotely suggests that respondent's conduct in this case is within the class of primary labor action.

The only other part of *Rabouin* which is possibly relevant is its holding (195 F. 2d at 912), affirming the position of the Board (87 N. L. R. B. at 981-983), that a cessation of work by employees, acquiesced in by their employer, resulting from their employer's previous and unrepudiated agreement not to require his employees to work on "unfair" goods, is not a strike or a refusal to work engaged in or induced by the union as prohibited by Section 8 (b) (4) (A). The short of such a situation is that a cessation of work to which the employer consents can hardly be called a strike against him. This holding has no application to this case because there was here

⁸ In that case, *Rabouin*, in an effort to evade his agreement to hire only union drivers, leased some of his trucks to another company, Atlantic, under an arrangement whereby *Rabouin* assigned the drivers to these trucks. *Rabouin* thereupon hired non-union drivers for the Atlantic runs, and the union called *Rabouin's* employees out on strike to compel him to employ union drivers. The Court held, in agreement with the Board, that the object of the strike was to require *Rabouin* to adhere to his agreement to employ union men; the object was not to cause *Rabouin* to cease doing business with Atlantic and it was not enough that such discontinuance might be a "by-product" of the primary strike against *Rabouin*.

no agreement by the Company with respondents consenting to the employees' refusal to work on disfavored goods. The only part of their agreement possibly touching on this question is Article VI (c) providing that (R. 47):

All shingles and byproducts produced fair shall not be declared unfair providing the plant does not attempt to operate unfair with fair stock on hand.

On its face this provision is utterly ambiguous.⁹ No extrinsic evidence was introduced clarifying its meaning. The provision may only be a restriction on the Union in declaring the Company's own products "unfair"; it may not refer at all to the Company's purchase of "unfair" products from others. Even if it applies to purchases by the Company, it would still require very generous inference to spell out from this provision an advance commitment by the Company not to require its employees to work on purchases designated "unfair" by the Union. Since the consequence of such a construction is to deprive the Company of its statutory protection against secondary boycotts, it is not permissible to imply such a relinquishment "in the absence of a clear and unmistakable showing of a waiver of such rights." Cf., *Tide Water Associated Oil Co.*, 85 N. L. R. B. 1096, 1098; *Iron Fireman Mfg. Co.*, 69 N. L. R. B. 19, 20; *N. L. R. B. v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2).¹⁰

⁹ Contrast the unambiguous agreements in *Rabouin*, 87 N. L. R. B. at 981, n. 28.

¹⁰ Respondents also rely upon *Douds v. Sheet Metal Workers*, 101 F. Supp. 273 (original opinion), 970 (on rehearing) (E. D. N. Y.), a preliminary injunction proceeding instituted by the

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.¹¹

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

BERNARD DUNAU,

JAMES A. RYAN,
Attorneys,

National Labor Relations Board.

AUGUST 1953.

General Counsel of the Board to restrain an alleged violation of Section 8 (b) (4) (A). To whatever extent this decision, as limited on rehearing, may go beyond the decision in *Rabouin*, we submit that it is erroneous. For the history of this case before the Board, see *Sheet Metal Workers International Association*, 102 N. L. R. B. No. 166, 31 L. R. R. M. 1479.

¹¹ Before the Board, respondents moved to dismiss the complaint as moot, giving as their reason that the specific controversy concerning the shipment of shingles from the North Shore Shingle Company had terminated. It is settled that an unfair labor practice proceeding is not mooted by either the termination of the particular incident giving rise to the violation (*Local 74 v. N. L. R. B.*, 341 U. S. 707, 715), or indeed by the discontinuance of the total course of unfair conduct (which respondents do not claim) (*N. L. R. B. v. Mexia Textile Mills, Inc.*, 339 U. S. 563; *N. L. R. B. v. Pool Mfg. Co.*, 339 U. S. 577).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

FINDINGS AND POLICIES

* * * * *

[SEC. 1]. Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

* * * * *

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign coun-

try and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

* * * *

UNFAIR LABOR PRACTICES

* * * *

[SEC. 8]. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * *

[SEC. 8]. (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

[SEC. 10]. (e) The Board shall have power to petition any circuit court of appeals of the United States * * *, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

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COUNCIL and EVERETT LOCAL 2580 SHINGLE WEAVERS'
UNION, *Respondents.*

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NATIONAL LABOR RELATIONS BOARD

RESPONDENTS' ANSWERING BRIEF

WETTRICK, FLOOD & O'BRIEN

GEORGE E. FLOOD

GEORGE O. TOULOUSE, JR.

805 Arctic Building

Seattle 4, Washington

FRANCIS X. WARD,

222 East Michigan Street

Indianapolis, Indiana

Attorneys for Respondents.



FILED

OCT 7 1951

PAUL E. O'BRIEN

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WETTRICK, FLOOD & O'BRIEN
GEORGE E. FLOOD
GEORGE O. TOULOUSE, JR.
805 Arctic Building
Seattle 4, Washington

FRANCIS X. WARD,
222 East Michigan Street
Indianapolis, Indiana
Attorneys for Respondents.



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United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WASHINGTON-OREGON SHINGLE WEAVERS'
COUNCIL and EVERETT LOCAL 2580 SHIN-
GLE WEAVERS' UNION, *Respondents.*

No. 13768

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENTS' ANSWERING BRIEF

JURISDICTION

This case, before the court on the petition of the National Labor Relations Board for an order of enforcement, pursuant to Section 10 (e), rests for jurisdiction upon 29 U.S.C. Sec. 151, et seq.

The decision, the enforcement of which respondents herein seek to resist, is to be found in 101 NLRB 203.

STATEMENT OF FACTS AND ISSUES

We do not accept the narration of facts contained in the Board's brief as sufficiently well balanced and comprehensive as those appearing in and established by the record. Certain omissions, and certain emphasis given to some circumstances taken altogether out of context,

if allowed to stand without amplification would, in our judgment, serve to blur the true picture and to place respondents in a false light. We deem it our duty, therefore, to explore a little further into the facts than petitioner has done and to call attention to certain factors which the Board in its findings and decision overlooked or disregarded.

We are not unmindful of the fact that formerly, prior to the amendment to Sec. 10 in the Act of 1947, courts were disposed not to disturb Board findings and not even to inquire into them or look behind them. This rule resulted in a certain degree of finality and conclusiveness inhering in the findings of the Board. The amendment of 1947 however required that facts found by the Board could stand only where they comport with the entire record or, to put it in the language of the amendment, "if supported by substantial evidence *on the record considered as a whole.*" This amendment undertook to bring the scope of review of the Board's decision into conformity with the requirements of the Administrative Procedure Act, so that the courts no longer were required merely to "rubber stamp" whatever findings the Board chanced to make, but by virtue of the amendment courts were given a substantial power to scrutinize and examine the entire record and to revise the findings of the Board where such findings did not reflect a consistent construction of the record taken as a whole.

No longer is it merely sufficient to search the record to see if there is anything whatsoever therein to sustain or support a Board finding. Contradictory evidence or

evidence from which conflicting inferences may be drawn must also be taken into consideration. No better statement of the principle applicable here is to be found than in the language of the Supreme Court of the United States in *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1951):

“Congress has made it clear that a reviewing court is not barred from setting aside a board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board’s view.*”

This principle is further exemplified in the *Universal Camera* case upon remand, *N.L.R.B. v. Universal Camera Corporation* (C.C.A. 2, 1951), 190 F.(2d) 429. Cases to the contrary, decided prior to the amendment, such as *Carlisle Lumber Company v. N.L.R.B.*, 94 F.(2d) 138 and *Reeves Rubber Company v. N.L.R.B.*, 153 F.(2d) 340, both of the Ninth Circuit, are no longer controlling.

It cannot here be successfully urged that the evidence was so conflicting as to justify the Board in appraising it, weighing it and selecting therefrom one inference rather than another. In the first place there was very little conflict in the factual testimony. Where such conflict occurred, however, it is proper to have in mind the principle enunciated by the Court of Appeals for the Third Circuit in *N.L.R.B. v. Sun Shipbuilding & Drydock Company*, 135 F.(2d) 15. That court held that a Board’s finding, supported by conflicting evidence from

which either of two inferences may be drawn need not be given conclusive effect by a reviewing court since evidence which equally supports one or the other of inconsistent inferences is not substantial.

In the light of that principle, we shall now undertake to recast the facts as we deem them to be substantially and conclusively established by the record. Considered in their true perspective, they preponderate we submit against the inferences and conclusions drawn by the Board in its decision.

We wish to advert to one further consideration before we recapitulate what we consider to be the factual basis of the controversy here. The trial examiner at the hearing rejected a number of our offered exhibits, notably Exhibits 2 and 3 (R. 468), 5 and 6, (R. 392), 7, (R. 433), as well as certain testimony relative to the subject matter of these exhibits. Respondents excepted thereto, both at the time of the hearing, as well as formally before the board (R. 218, 162, 163, 193, 201, 233, 234, 237, 205, 206, 256, 257, 293, 295, 298, 299). Our grounds are adequately covered in the exceptions to which we have made paginated reference, and we shall not encumber this brief by repeating them here. They have a substantial relation to the union's policy of protecting its union label against infringement, and promoting its use and acceptance in the trade, and they exemplify the union's efforts to implement this cardinal policy. Moreover, a consideration of these exhibits is necessary if we are to understand the substance and the

essential nature of the dispute between the parties here.¹

Sound Shingle Company is a copartnership, composed of John E. Martin and Frank S. Barker. These two copartners are substantial owners, stockholders and officers of the Perma Products Company at Chehalis, Washington. The Perma Products Company at that time operated a grooving and staining plant at Chehalis. The union had had difficulty with the Perma Products Company over the improper and illegal use by that company of its union label. This matter went so far as to involve litigation in the United States District Court for the Western District of Washington, Southern Division, and an offer of proof by the respondent at the trial to show that the litigation was disposed of by a stipulation on the part of the company, admitting its improper use of the label and undertaking thereafter to avoid doing so, was rejected by the Hearing Officer. This fact however has significance by virtue of conferences, referred to by Mr. Martin in his testimony, between officers of the union and himself in the

¹ Martin was one and the same individual, whether wearing the cloak of manager of Perma Products, or of Sound Shingle. The dispute with him was engendered in either case by the union's realistic concern that non-union and non-label shingles would be grooved under his operation, and shipped to the trade, in such a way as falsely to indicate that they were manufactured under union label conditions. The rejection of these exhibits, as well as of testimony relevant thereto, was decisive and prejudicial error. This comment and explanation will apply to these exhibits in our discussion hereafter, without necessity of breaking continuity thereof by repeating them.

office of the Perma Products Company in Chehalis, during which the union made it plain to Mr. Martin that insofar as he intended to operate a new grooving plant at Marysville, Washington, the union would continue, by all means at its command, to object to the use of non-label shingles.

Contemporaneously with these conferences, Mr. Martin and his partner commenced operations in the latter part of January, 1951, of the plant at Marysville, Washington. The plant consisted of a shingle mill, a dry kiln and a grooving plant, all comprising an operational unit and located on a common plant situs. It was under the charge of a single superintendent (R. 446, 447, 448, 458, 459). The shingles which were used in the grooving process and in the grooving plant were manufactured in the shingle mill and were either taken from inventory of shingle stock on hand or acquired by Sound Shingle from other shingle manufacturers—all using the union label. All shingles used in the manufacture of shakes and in the grooving thereof throughout the company's operation between the opening of the plant in January, 1951, and the date of the controversy in January, 1952, were made in the employer's own shingle mill by employees, members of the respondent union, or purchased from other shingle plants recognizing respondent union's standards of wages, hours and conditions as symbolized by said respondent's union label.

Respondent unions are members of the United Brotherhood of Carpenters & Joiners of America. They received their charters from the United Brotherhood. They are subject to and governed by the constitution

and by-laws of the Brotherhood. The policies of the United Brotherhood of Carpenters & Joiners of America are the policies of respondent unions. They co-operate and participate with the many other locals and district councils, members of and chartered by the United Brotherhood.

The United Brotherhood of Carpenters & Joiners has traditionally sought to protect its standards of wages, hours and working conditions by insisting scrupulously upon the universal use of its label on all products manufactured by its members, and upon refusing to install, process or use products which do not bear the trademark of organized labor or the Carpenters' union label. These are key requirements contained in the constitution and by-laws of the Brotherhood.²

The function of the union label in a program of organized labor generally, and the United Brotherhood of Carpenters & Joiners particularly, is too well understood to require any discussion thereof here. It needs only to be said that the label constitutes notice accompanying goods, in the production of which members of the union are employed, for the purpose of indicating such fact and thereby to permit union sympathizers and those to whom the label conveys an assurance of sound workmanship and hygienic conditions of manufacture, to favor the choice of such goods. The ultimate effect of

² See Constitution, Article A, Sec. 3, Constitution of Brotherhood (Respondent's exhibit No. 7) (R. 65, 66); for a copy of the Carpenters' label see Ex. R-X-6 (R. 64); for union label provisions in the by-laws see By-Laws, A, Sec. 60, A. B. C. and E., and G. and N. (R. 154-55-56-57).

such policy is to stimulate the demand on the part of the manufacturers for union labor, which will ultimately benefit union personnel by stabilizing their employment or by increasing their wages.³

So concerned was the United Brotherhood about obtaining the maximum benefit from the use of its union label that as long ago as August 6, 1903, the United Brotherhood caused its label to be registered as a trademark with the Secretary of State of the State of Washington (R. 201, Ex. 11).

The Washington-Oregon District Council, a respondent herein, in recent years, gave a considerable degree of emphasis to underscoring the importance of protecting the Carpenters' union label. At its 1950 convention, Mr. O. M. Sarrett, its union label representative, assigned to the promotion of the union label, reported to the members and delegates in accordance with the "Shingleweaver" of March, 1950, and the whole report tends to point up the importance to the union of preserving its union label and its union label standards. Among other things he said:

"The shingle business looks a lot better now, as compared to a year ago. We have been very successful in eliminating *non-union shingles and shakes* from the California market. This does not mean that all unfair Canadian or other non-union material has been eliminated; however, it is safe to say that most of the shakes and shingles now used in California *bear the Carpenters' union label.*" (Our emphasis.)

³ See Labor Dictionary, Casselman, 1940 s.v. "Union Label," page 490.

He frequently pointed out that Canadian shingles, to the extent to which they were used, were “non-labeled material.” He deplored the use of “*non-union*” shingles and spoke of the problem in such terms at San Mateo, at Sacramento, at Oakland, Bakersfield, Santa Barbara and other cities in California. When he spoke of Oregon he spoke in terms of “co-operating in our *union label drive*.” In Vancouver and Longview, Washington, he spoke of the problem in terms of “*non-union shakes*.” Similarly, in the Eastern Oregon area.

And in his report he said something else that is quite germane to the present problem. He pointed out that Mr. Martin, manager of the Perma Products Company, of Chehalis, Washington, was operating “an unfair shake mill, running long hours, Sundays and holidays, paying low wages in competition to our fair shake mills. He is also buying all of the unfair 18-inch Canadian shingles he can get at thirty-five cents per square below the American price and shipping them back East to be re-manufactured by ‘scab’ labor. How,” he said, “can our fair shake mills compete against a situation of this kind?” and he answered it by insisting upon the universal use of the Carpenters’ union label (Same exhibit. R. 16). The president, Art Brown, made a similar report (Ex. 3. R. 17, 18). He spoke of the program “*with the union label*” which, he said, “has succeeded in keeping out a lot of Canadian shingles * * *.” Similar reports were made in the convention of 1952 by both Art Brown, the president, and O. M. Sarrett, the union label representative. Always there was stress put upon the necessity of insisting upon the Carpenters’ union label.

As a corrolary thereof it was frequently mentioned that the use of Canadian shingles constituted an infringement upon union label conditions and the right of the respondent union to insist upon the integrity of its union label.⁴

Respondent union's insistence upon the observance of its union label standards was a fact quite well known and understood by Mr. Martin, one of the co-partners of the Sound Shingle Company, before he entered into the Sound Shingle corporation. He was a manager of the Perma Products Company, a shake and staining plant at Chehalis, Washington, which had been in business for quite a number of years prior to the opening of the Sound Shingle plant. As such manager, he became involved with respondent union in a dispute arising over the fact that his company had illegally used the Carpenters' label in connection with grooved and stained shingles, which he sold on the California market with the respondent's label attached thereto, not-

⁴ The Board treated these reports and declarations as evidence of a primary conspiracy directed against the importation of Canadian shingles *qua* Canadian. This is a false and misleading view. The union was merely exercising its legitimate right to protect its own label and to preserve its own hours, wages and conditions and particularly its six-hour day and superior wage rates and its full complement of employment. This is a traditionally recognized and approved function of organized labor and one guaranteed to it under Section 7 of the Act and emphasized again under Section 8 (c). Furthermore, it is our position that these reports and publications cannot, under the protection of § 8 (c) of the Act, be used as evidence of the commission of an unfair labor practice. (See *infra* p. 26).

withstanding the fact that his operation throughout was non-union and unfair. As a result thereof litigation in the United States District Courts ensued and this litigation was disposed of by a stipulation whereby it was admitted that the label had been improperly used and an assurance was furnished that no such infringement upon the label would occur in the future.

Coincident with the adjustment of this controversy a Mr. Sarrett, union label representative of the respondent union, while conferring with Mr. Martin in his Perma Product office in Chehalis, took occasion to advise Mr. Martin that he understood that he and his associate, Mr. Barker, likewise an official of the Perma Products, were about to initiate the operation of the Sound Shingle Company in Marysville. He reminded Mr. Martin of the fact that if Mr. Martin desired to operate with the aid of employees, members of the respondent union, that he could not by any means use non-label, non-union shingles, Canadian or otherwise, and this fact, coupled with Mr. Martin's experience with respect to the infringement of respondent's union label in the Perma Products operation, was quite well known and understood by Mr. Martin. (R. 205; 264-265.)

With full knowledge of this fact, and quite acutely aware of the objection and refusal of respondent union to working upon or using products produced unfair to the United Brotherhood and lacking the Brotherhood's union label, Mr. Martin—some two months after initiating the operation of the Sound Shingle Company of Marysville—entered into a contract of collective bar-

gaining with respondent union. At the time that he did so he was explicitly informed of the union's objection to working upon non-label products. This did not deter him from entering into a collective bargaining contract. (For the contract, see R. 206; 39-62.)

With this knowledge in mind, Mr. Martin, on behalf of the Sound Shingle Company, operated for months, approximately some 10 months, without any difficulty or dispute with respondent union. He made no attempt during that period to introduce any shingles for processing and manufacturing into grooved shakes, other than those which were manufactured fair to respondent union and entitled to and bearing the Carpenters' union label (R. 448, 449, 451).

Then suddenly, on January 11, 1952, without notice to the union and fully aware of their objections to non-label products, he imported a carload of shingles consigned to him, which he later admitted he had purchased in his own name, and switched them onto his siding for unloading and use in grooving in his grooving plant. These shingles he purchased from North Shore in B.C., under an oral arrangement to ship them to North Shore customers in the U.S. All of this was however unknown to the union.

Having in mind the background of this case—and we cannot adequately appraise the importance of the facts herein without considering the impact of what had gone before with what occurred on the critical day of January 11—it is not a matter of surprise that employees of the shake plant, members of respondent union, ceased

work and refused to process non-union, non-label shingles. True, it was recognized that the shipment of shingles originated in B.C., but that was not the ground assigned for refusal to work or process them. Uniformly, each employee gave as his reason that the shingles did not bear the union label. That they happened to be Canadian shingles was merely evidentiary to those engaged in the business that such shingles, by reason of that fact, were included among those that did not and were not entitled to bear the union label. Any mention of the fact that they were Canadian shingles was in each and every instance inseparable and indistinguishable from the fact that over and above everything else they were non-union, non-label shingles. It was the non-union, non-label status of the shingles that gave rise to the controversy and dispute.

Another factor is important. Between the date that the contract was executed between the union and the company and the date of this shipment of non-union, non-label shingles, the company had uniformly employed shingles manufactured under union conditions with the union label attached thereto and of course, naturally, no dispute arose (R. 451); the offense to union standards inherent in the shingles imported on January 11 was essentially that such shingles were non-union and non-label. There is no real logical significance in the fact that they were Canadian shingles. The union knew nothing about their arrival; nothing about where they were manufactured, other than upon inspection it was learned that they were non-union, non-label. Obviously, the very fact that they were manu-

factured in Canada, which was disclosed by the North Shore label attached thereto, was sufficient evidence to the union and its employee members that they were non-label, but that fact was confirmed by a particular examination of the bundles in the shipment as testimony in the record amply establishes. It was not that they were Canadian shingles that rendered them objectionable; it was the fact that they were non-union and non-label and manufactured under substandard conditions inimicable to the interest and welfare of respondent union. This is amply affirmed by the testimony of the witness Butters, the then superintendent of the company who testified that Canadian shingles were uniformly considered unfair by the union, and he, himself, on this and prior occasions had clearly explained this fact to Martin, the manager of the company (R. 454).

No probative fact is added by conversations between Brown, Sarret and Baker, union representatives, and Martin for the company, which took place some days subsequent to the controversy. No contact whatever occurred at any time between respondents and North Shore in Vancouver, B.C. No priority of any kind ever existed between them and North Shore. North Shore was a total and complete stranger to respondents.

The subject matter of this dispute was simply a refusal, in accord with a known and established policy, to groove shingles, by shingle union members, which were non-union and non-label shingles. The shingles happened to come from Canada, but that was merely an incident, not a cause. The moving cause was the

non-union, non-label status of the shingles. Had they come from Idaho or Bellingham, without the union label and therefore non-union in character, that fact would have provoked precisely the same result: a refusal to work on shingles made under conditions unfair to the shingle weaver's union.

SPECIFICATION OF ERRORS RELIED UPON

1. The Board erred in determining that respondents violated Section 8 (b) (4) (a) of the Act by engaging in concerted activities in inducing and encouraging their own members where the object of respondents' inducement, encouragement and concert of action was for the purpose of protecting respondents' interest in their Union label and for the purpose of enjoying their contract rights existing by and between respondents and their membership, and by and between the respondents and the employer herein questioned (R. 239 et seq.).

2. The Board erred in failing to find that any and all of the conduct of the respondents herein, as disclosed in the record, consisting of communications, publications and advocacy of respondents to their own membership, was not protected, concerted activity within the meaning of Section 7 of the Act, and was not privileged conduct, communication, publication and advocacy within the meaning of Section 8 (c) and Section 13 of the Act, and of the First Amendment to the Constitution of the United States; and the Board's finding communications, publications and advocacy by and be-

tween respondents and its members is evidentiary of a violation of 8 (b) (4) (a) of the Act, is beyond the jurisdiction of the Board, and this is particularly true where respondents' conduct, communications, publications and advocacy are not related to or contemporaneous with an existing labor dispute (Exs. 2, 3, 4; R. 12-30. Admitted R. 344. Objections to admission R. 324-328, 344).

Each of the exhibits erroneously admitted were privileged communications under Section 8 (c) of the Act, each being a part of a newspaper publication of respondent District Council to its members with respect to its own internal affairs; as such they are non-probative of any alleged violation of 8 (b) (4) (a).

3. The Board erred in affirming the findings of fact, conclusions of law, intermediate report, and recommendations of the Trial Examiner and in entering its order and decision dated December 19, 1952. Said findings of fact, conclusions of law and recommendations, decision and order are arbitrary and capricious and not supported by substantial evidence on the record considered as a whole (R. 237 et seq.).

4. The Board erred in failing to find that the only dispute shown by the record was between the employees of Local No. 2580 and their immediate employer, the Sound Shingle Company (R. 239 et seq.).

5. The Board erred in failing to find that the respondents had no labor dispute with or any relations with North Shore, Limited, or its employees or any

other Canadian employer or manufacturer or their employees (R. 239 et seq.).

6. The Board erred in failing to find that the members of respondent union, Local No. 2580, who left their work on January 11, 1952, did so voluntarily and without any coercion from respondents (R. 239 et seq.).

7. The Board erred in finding that the respondents had or now have a policy to refuse to work on shingles of Canadian manufacture (R. 239 et seq.).

8. The Board erred in finding that communications, publications or advocacy exchanged between respondents and its own members involved "threats of reprisal or promise of benefits" to its own members. (Assignment e).

9. The Board erred in failing to find that Article VI, paragraph (c) of the collective bargaining agreement existing by and between respondents and the Sound Shingle Company contemplated that respondents' members were not required to work on products not bearing respondents' label or on products not produced under "fair" conditions.

10. The Board erred in rejecting respondents' Exhibit 2 (R. 31. Rejection R. 468), Exhibit 3 (R. 37. Rej. R. 468), Exhibit 5 (R. 63. Rej. R. 392), Exhibit 6 (R. 64. Rej. R. 392), Exhibit 7 (R. 65. Rej. R. 433), Exhibit 10 (R. 199. Rej. R. 451), Exhibit 11 (R. 201. Rej. R. 461), and in suppressing subpoena *duces tecum*, Ex. 12, R. 469; 201.

Each of the exhibits was offered to show that the

motive and object of respondent District Council, in encouraging its members to refuse to work on non-label products, were bottomed upon its members' obligation under its Constitution and By-laws as well as upon their contractual relationships with their employer, Mr. Martin, with whom the union had a prior union-label controversy.

Each of the exhibits was relevant and material upon the issue as to whether or not respondents' object in refusing to work on non-label products was motivated by a concern over misuse of its union label rather than, as claimed by the Board, over Canadian shingles as such.

11. These respondents further rely upon the exceptions set forth in their statement of exceptions to certain findings and rulings of the Trial Examiner upon the hearing herein, which exceptions were by the Trial Examiner and the Board overruled, a copy of which are a part of the transcript filed herein, on the ground that such findings and rulings are erroneous and contrary to law (R. 217).

12. That the Board erred in its findings, conclusions and decision holding that respondents' conduct constituted a secondary boycott against their immediate employer Sound Shingle, in furtherance of an alleged primary boycott directed against some alleged anonymous Canadian manufacturer with whom respondents had no business or collective bargaining relationship whatsoever; that on the contrary the dispute here in

question was one arising exclusively between respondents and their members on the one hand and their immediate employer Sound Shingle on the other, and was primary rather than secondary (R. 239 et seq.).

ARGUMENT

Problem Analyzed

It is the respondents' position that the dispute involved in this proceeding is one primarily between the respondent union and its members, employees of the Sound Shingle Company, and their employer, the Sound Shingle Company. The dispute runs immediately between these employees and their employer and neither extends to nor does it involve any other employer or the employees of any other employer. To the extent to which any question of a boycott may arise therefore, it involves a boycott—if any at all—between the employees of Sound Shingle and the Sound Shingle employer. It is plainly and simply a primary boycott. It cannot, we submit, by any process of metaphysics or linguistic legerdemain, be extended or expanded into any proper or legal concept of a secondary boycott.

As we approach the argument in this case, there is one primary consideration, as we view it, that is to be borne in mind:

Not all concert of action nor all boycotts are condemned or rejected by the terms of the Taft-Hartley Act, and specifically by the boycott provisions thereof.

Section 8 (b) (4) (A). Concededly, it might be argued that the language of that section, taken literally within its four corners, would bar any and all concert or activity falling within the definition of a boycott. Clearly, it is upon this assumption that the Board is proceeding in this case. The Board's decision in this case rests upon a literal application and literal interpretation of the language used in Section 8 (b) (4). The issue that lies at the very threshold of this case is whether or not such a literal interpretation finds any warrant or justification in the law.

It is our answer that the Board, in taking such a position, is in error. To uphold it in such a rule would be, as the Supreme Court itself has significantly recognized,⁵ to bar all picketing, strikes or union activities or pressure of any and all kinds. Such a construction is contradictory and negated by Section 13 of the Act. The late Senator Taft recognized the distinction between a primary and secondary boycott when he declared that Section 8 (b) (4) (A) barred only *secondary* boycotts. Primary boycotts are therefore unaffected.

At odds, curiously enough with the Board's decision here, are a long line of frequently cited cases which establish that in prior decisions the Board has not taken issue with our position but has clearly recognized its propriety. Among others, we may cite the *Pure Oil Case*, 84 N.L.R.B. 315; *Deena Artware*, 86 N.L.R.B. 732;

⁵ *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 65, and *I.B.E.W. v. N.L.R.B.*, 341 U.S. 694, 95 L. Ed. 308.

Ryan Construction Co., 25 N.L.R.B. 417; *Lumber and Sawmill Workers* (Santa Anna) 87 N.L.R.B. 937; *International Teamsters* (DiGeorgio Wine) 87 N.L.R.B. 720; Cf. *Samuel Langer*, 82 N.L.R.B. 1028; *Sealbright Pacific, Ltd.*, 82 N.L.R.B. 271.

This same position has been vindicated in several court decisions which we shall discuss with appropriate particularity later in the body of this argument.

Nor has the Board or the courts hesitated to apply the distinction between a primary and a secondary boycott and to recognize the protected status of a primary boycott merely because, as an incidental effect thereof, the business of some neutral is adversely affected or infringed upon. If such neutral suffer damage, such damage is not the direct object of the union's concert of activity and is therefore purely incidental and falls under the category of *damnum absque injuria*.⁶

With these preliminary considerations in mind, let us recapitulate a few controlling facts. The complaint in this case was filed upon the application of the Sound Shingle Company. In effect, the Sound Shingle Company is the complainant. The Sound Shingle Company complains that its employees—members of the respondent union—refused to work to the extent to which they declined to groove certain shingles. This is the very essence of the dispute. It cannot be denied that the subject of the dispute is the refusal of the employees of Sound Shingle—members of respondent union—to

⁶ The *Rabouin* case (*Conway Express*) 195 F.(2d) 907; *Interborough News*, 90 N.L.R.B. 213; *Douds v. Metropolitan*, 75 F.Supp. 672.

groove the shingles in question. It involves a refusal of these employees to work for the employer where the conditions giving rise to the dispute revolve around non-union shingles. It is idle, fantastic and *contra-factum* to seek to reach into the clear blue, as it were, to find any other employer than Sound Shingle who has a dispute with Sound Shingle's employees, members of the respondent union. The disputants are manifestly the employer Suond Shingle on the one hand and its employees, members of the respondent union, on the other. To seek to confer such a status upon the North Shore Shingle Company, Ltd., or any other Canadian employer, is merely to resort to whimsy, fiction and fantasy and to deal with strawmen in total defiance to the realities and actualities of the facts of the case.⁷

⁷The Board in the past has known how to distinguish between primary and secondary boycotts. A very instructive case upon that subject is that of *Truck Drivers Local 649, International Brotherhood of Teamsters v. Jamestown Builders*, 93 N.L.R.B. 386 (February 23, 1951). There the Teamsters struck and picketed the Pearl City Fuel Company and followed its trucks to two construction jobs—one Scalise and the other, Carlson. In order to determine whether or not the Board had jurisdiction it was first necessary to distinguish between primary and secondary picketing. Said the Board: "We shall assume for the purpose of this decision, without so deciding, that this picketing was designed to induce or encourage employees of Scalise and Carlson to engage in a strike or refusal to handle the products of Pearl City, with the object of forcing or requiring Scalise and Carlson to cease doing business with Pearl City. As such, the conduct complained of constituted a secondary boycott in which Pearl City, with whom the respondent was then engaged in a dispute over the hiring of non-union

Protected Activity

It is the specific function of Sec. 7 of the Act to afford unions protection, as the language of the section expresses it, for “concerted activities for mutual aid and protection.” A refusal to work upon non-union and non-label shingles literally falls within the scope of “mutual aid and protection.” The right to do so is one of the corner stones upon which the very existence of organized labor stands. Take that away and the impetus and drive behind the organization of labor and the maintenance of strong labor unions substantially diminish and fail.

The Board, in its brief, apparently concedes this to be true:

“Without a doubt,” it says, “respondents are entitled to protest any unauthorized use of its label.” (Board Brief page 18.)

But, said the Board, the union never protested any misuse of its label. The Board would relegate the union to a waiting game: waiting until the mischief actually occurs and is discovered; waiting until the “horse is stolen before closing the barn door.”

But this is to place too narrow a restriction and limitation upon the guarantees of Sec. 7. Certainly, the union has the right to protest, as the Board so largely admits. But more than that it has the right to take effective measures to prevent misuse and infringement before it occurs.

drivers and whom the pickets named as unfair, was the primary employer and Scalise and Carlson the secondary employers.”

The union here had every reason to be apprehensive about the misuse of its label. (1) It knew from prior experience with Martin of his disposition to sell and ship unfair non-union shakes and stained shingles with the union's label unauthorizedly attached to them, as though they were made by members of the union under fair conditions. (2) It knew that under the contract of collective bargaining with Martin, as Sound Shingle, if it grooved his shipment of non-union shingles, he had the right and in every probability undoubtedly would exercise it, to sell and ship them with the union label attached, thus giving the non-union, non-label shingles the union's blessing merely because the subsidiary grooving process was done by members of the respondent union. (3) The union knew finally that the shipment of shingles which its members were called upon to groove had been manufactured under conditions of wages and hours unfair to the Shingleweavers' Union. It was this objection—an objection of each individual member—that resulted in their refusing to work on products which in their idiom they classed as "scab" shingles; refusing to undercut union standards and union label conditions.

Union members knew one more thing: They knew that prior to signing a collective bargaining contract with the union, Sound Shingle and Mr. Martin, its manager and co-owner, knew of the union's policy of refusing to work on non-union shingles; they knew that he raised no objections thereto at the time of the execution of the contract but that, acquiescing therein, he operated some ten months thereafter in conformity

with the union's agreement and its policy as it had been expressly explained to him at the time that the contract was made and prior thereto. Now, does it matter or alter the situation in any respect that these shingles happened to come from Canada? Not in the slightest, logically or practically. Canadian shingles, it so happens, just do not qualify for union recognition under the standards of respondent union, nor are they entitled to the use of respondent's union label. Wherever and whenever they appear on the market they do so necessarily in the face of that very fact. But this is true not only of Canadian shingles; it would equally be true of any other non-union, non-label shingles no matter where made. Sarrett, in his report (R. 25) included Weyerhaeuser shingles, made in St. Paul, equally with those made in Canada, as within the condemnation of being "non-union." It is entirely false and unfair to the respondent union to indulge in a farfetched assumption that it would invoke the protection of its union label standards only in face of unfair Canadian products from B.C. or Canada.

It must be borne in mind that these respondent unions are not charged here with a violation of Sec. 8 (b) (4) (A) upon the ground that they may, forsooth, entertain some ideological preconception against the economic expediency of importing Canadian shingles. It may be fairly open to argument, as a principle of economics, that Canadian shingles and other products should be permitted free and unimpeded entry into the United States, but this is entirely beside the point here. It would be much more to the point to posit this ques-

tion: Must the union sit idly and helplessly by and waive its union standards and its union label protection merely because these shingles are of Canadian origin? To place the emphasis, as has the Board, upon Canadian shingles is to misconceive the thinking and the concern of the union. Its concern was over the maintenance of union standards and the protection of its union label. It was not interested in any ideological or economic problem with respect to the importation of Canadian shingles. The union and its members merely objected to working upon non-union products, come from where-soever they may.

These men who refused to work were members of the Shingleweavers' union. The men employed in the shingle mill, to which the grooving plant was but an adjunct, were members of their local. They quite well understood that, were they to groove the shingles in this non-union, non-label shipment, they would in effect deprive their fellow members of their very livelihood. Is this not indeed one of the most vital of legitimate union objectives? Does it not literally fall within the field of concerted activities for their mutual aid and protection? As such, they are expressly rendered licit by the Act.

**Publications and Advocacy Not Probative
of Violation 8 (b) (4) (A)**

The Court erred in receiving as evidence of violation of 8 (b) (4) (A), general counsel's exhibits 2, 3 and 4 (R. 344), each exhibit being a part of a paper edited by the Shingle-weavers Union and distributed

to its own membership. Respondents objected to the introduction of the exhibits and publication (R. 333-344) and reserved their exception to the admission thereof and the consideration thereof by the Board and their exceptions to the trial examiner's immediate report (R. 217 *et seq.*). The First Amendment to the Constitution of the United States protects freedom of speech and communication, publications, utterances and advocacy and protects them against impairment. *Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe*, 315 U.S. 722. This right is expressly granted by the Act itself, Sec. 8 (c):

“The expression of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.”

Over respondent's objection (R. 333-344), the trial examiner admitted into evidence, in support of the charge of unfair labor practice, certain publications of respondent's trade journal, consisting of reports by Mr. Brown, president of the union, and Mr. Sarrett, a union label representative of the union, to the state convention of the Washington-Oregon District Council. Some of the articles are references to the problem involved in the importation of Canadian shingles in competition with American shingles, and each article refers to the fact that the Canadian shingles were representative of non-union and non-label shingles manufactured under conditions unfair to the respondent un-

ion. As the very basis of this controversy, therefore, we find the union again seeking to protect the standards exemplified by the display of the union label. We here renew our objection that each of these articles is incompetent, irrelevant and immaterial as an attempt to prove an unfair labor practice under Section 8 of the Act. "They shall not," says the act, "constitute or be evidence of an unfair labor practice." Certainly, Section 8 (c) meant something. We are justified, are we not, in assuming that it meant just what it said?

The union, we submit, had the right to advocate that their members do their utmost to respect the union label and to promote its widespread use. There is not one syllable of evidence in the record as much as suggesting that officers in respondent union approached any employees on the job and threatened them in any way in connection with their employment. Each of the articles was disseminated in the union's own newspaper to all of its members; it was directed to its readers, members of the union, in their capacity as members of the union and not in their capacity as employees of any employer.

The very essence of free speech is the right of an organization to publish a newspaper for its members and in that newspaper to advocate and urge its readers and union members to take steps to protect the integrity of their union label. The union label has become a badge of quality of union made products in every state in the nation. The purpose of the label was to inform the public at large, and union members throughout the na-

tion, that the product bearing the union label was made by union men and under union conditions.

The union label was the symbol of a union product, made under conditions fair to the working class; its absence on the product is notice to the union member to refuse to deal with the maker thereof, or refuse to work upon or process it. To purchase a non-label product is to aid an employer who is unfair to his employees and to injure the union employer who is fair to his employees and to organized labor. Use of the label promotes employment of union members. Non-use or misuse decreases such employment.

Congress did not outlaw the union label; nor could it constitutionally do so. Congress did not outlaw the right of working men to refuse to work on non-union label products. The importance to the labor movement of not working on non-label products is best evidenced by the fact that it is part of the oath and the constitution and by-laws of these respondents (Res. Ex. 8. R. 167. Resp. Ex. 7. R. 65). The over-all object is to compel all employers in every industry to grant their respective employees' union and union label conditions considered fair by and to organized labor. In the instant case, the absence of the union label on the shingles shipped by North Shore was notice to Sound Shingle's employees to refuse to work thereon. They did not strike, nor did they refuse to work on any product of Sound Shingle bearing the union label. It is clear that Section 8 (c) was intended as a rule of evidence, making it in effect a privileged communication, provided the "expression contains no threat or reprisal or force

or promise of benefit.” Not one of these articles contained a threat of reprisal or force or promise of benefit and, as such, clearly met the conditions of Section 8 (c) and was clearly a privileged communication of a character protected by Section 8 (c) of the Act. It is respectfully submitted that the Board committed prejudicial error in receiving and considering general counsel’s exhibits 2, 3 and 4 as evidence of a violation of Sec. 8 (b) (4) (A).¹⁶

Union Label and Right to Protect It

The trial Board refused to recognize the impact of the use or misuse of respondent’s union label upon the facts and circumstances of this case. Not only did it minimize the union label as a factor explanatory of the conduct of certain employees of respondent union in refusing to process the shingles received in this single shipment, but in a large measure it ignored it. It magnified the role of respondent’s publication, “The Shingle Weaver,” and the declarations of O. M. Sarett published therein as constituting an attack upon Canadian shingle *qua* Canadian shingles, and an alleged attempt to exclude them from American markets solely because they were Canadian shingles; it refused to recognize the real issue: that of the union’s right to protect its union label. The trial examiner and the Board,

¹⁶ This argument is without prejudice to our argument earlier in the brief that such articles and publications evidence a legal concern to protect the union against non-union and non-label conditions. Their use for that purpose once they are in evidence is not prohibited by 8 (c).

we respectfully submit, missed entirely the real point at issue in this case.

It is entirely fallacious to assume, as did the trial examiner, that respondents had any animosity whatsoever against any shingles manufactured by North Shore, Ltd., of Vancouver, B. C., or those of any other anonymous Canadian manufacturer. To the extent that Canadian shingles which were incapable of bearing the union label came within the denunciation of the respondent union, it was only because such Canadian shingles were manufactured under substandard conditions so far as wages and hours and conditions of labor were concerned, disqualifying their manufacturers from the right to use respondent's union label. Their use in employer's plant constituted unfair competition to respondents.

Respondent's right to protect its union label against misuse and to insure that it be used only in such a way that the manufacturer may not be able to pass off his products as those manufactured under conditions and standards fair to respondent union is a valid property right protected and enforced by the courts under the law of unfair competition.

No matter how much the general counsel or the trial examiner may have sought to insinuate into the issues of this case a controversy between respondent union and certain nondescript, anonymous and unknown Canadian manufacturers of shingles, there is involved but a simple controversy here. It lies exclusively between Mr. Martin of Sound Shingle and respondent union.

The controversy consists of a refusal of a small number of employees of the Sound Shingle—only those engaged in this grooving plant, none in the shingle operation—to work upon shingles submitted to them by their employer to be grooved into shakes, under circumstances where they would be shipped in commerce bearing respondent's union label and falsely appearing to all intents and purposes to have been manufactured under wages, hours and labor conditions compatible with the standards of employment enjoyed by members of the respondent union (R. 238).

It is clear and undisputed that respondents knew nothing whatsoever of any alleged contract between Sound Shingle of Marysville and North Shore, Ltd., of Vancouver, B. C. They knew nothing of any alleged agreement, oral or otherwise, whereby Sound Shingle purported to serve as a broker in grooving shingles on behalf of North Shore, Ltd. of Vancouver, B. C. They were privy to no dealing whatsoever with North Shore. They knew only that Sound Shingle had imported on to its spur certain shingles intending them to be processed by respondent into shakes, *which shingles bore no union label on their face and revealed that they were not entitled to be passed off in trade as having been manufactured under fair conditions by members of the respondent union*. Mr. Martin, manager of Sound Shingle, admits that North Shore has a shake plant of its own fully equal in capacity to that of Sound Shingle and the trial examiner and the Board found that when the shop steward, Martin, examined the shingles thus imported into the plant, he observed

that they bore no union label. That is the crux of the matter. In the absence of the union label, the employees *voluntarily* and of *their own motion*, went home. Brown gave them no specific orders. He was 60 miles away in Bellingham presiding over a convention, and he knew nothing about it.

There is, however, another very significant factor which the trial examiner failed and refused to evaluate. This fact stems from the close identity of interest which Mr. Martin, the manager and one of the partners of Sound Shingle, had and has in a similar operation, that of Perma Products Company, Chehalis, Washington. He is one of the stockowners of Perma Products and is the manager thereof. His partner in Sound Shingle, Mr. Barker, is likewise one of the stockowners and officers of Perma Products.

It appears without denial that respondent union had, shortly prior to the controversy here, engaged in a dispute which reached the stage of litigation with Mr. Martin as manager of Perma Products by reason of the fact that he persisted in shipping grooved shakes to the California market which he had processed from shingles purchased by him from shingle manufacturers who, under contractual relationships with respondent, affixed to their products respondent's union label. By the artifice of transposing the union label from the fair products of the original shingle manufacturer, to his own unfair product, he undertook to pawn his products off on the California markets as finished products manufactured under fair conditions by members of respondent union.

That this was the fact appears conclusively from the order to dismiss plaintiff's suit to restrain infringement filed with the United States District Court of the Southern Division, Western District of Washington. All of this evidence, properly offered upon the hearing, was rejected by the trial examiner as incompetent, irrelevant, and immaterial, as we have heretofore pointed out. Under the facts of this particular case, this evidence was distinctly relevant. Its rejection was prejudicial.

It was in the light of these facts and with the knowledge of the persistent efforts of Martin in marketing his non-union shakes, undertaking to clothe them as he did with the respectability of union manufacture, that respondents noted with some justifiable concern that within a month after the disposition of this litigation, Martin and Baker, the moving spirits of Perma Products, acquired a grooving or shake plant at Marysville. The shake plant consisted of one grooving machine. However, appurtenant to it, there was a shingle mill of a capacity sufficient to manufacture shingles to supply the entire output of the grooving machine.

But Sound Shingle, which included a shingle mill as well as a shake plant, had long been operated by employees members of respondent union under a collective bargaining contract, and in order to insure its continuity of operation, Martin as member of the respondent union renewed the contract. He knew of his own personal knowledge by reason of his litigation with respondent (and he cannot shield himself behind the fiction of a separate corporate entity) that members of

respondent union had an abiding antipathy toward the shipment of shake-products in commerce manufactured from any shingles other than those fair to respondent union and entitled to the respondent union's union label. Before he entered upon the Sound Shingle operation, Mr. Sarrett gave him specific knowledge of the union's fixed purpose to protect its union-label. It is idle for him to assume and to assert with feigned solemnity from the stand that he was surprised when members of respondent union refused to process non-union shingles into shakes. He had been amply advised by members and by representatives of respondent union and by his own managerial personnel not to seek directly or indirectly to use their services for the purposes of shipping non-union shingles in commerce and especially under circumstances where the purchaser might or would be misled into believing them to be both union shakes and union shingles.

The right of a union to protect its union label has often been recognized by the courts. Its label is in the nature of a trademark and it is viewed only as a part of the broader law of unfair competition. Its right to protection stems not only from the law of unfair competition but also from the fact that it is registered as a trademark both under state law and in the United States Patent Office. The right of a union to protect its trademark is illustrated in cases such as *Carson v. Ury*, 39 Fed. 777; *Cuervo v. Henkel*, 50 Fed. 411; and *Baker v. Master Printers, et al*, 34 F.Supp. 808.

The right of a union to protect its union label, falling as it does within the principles of trademark law, can

be said to be a property right and a very valuable property right. *United Drug Company v. Rectanus Company*, 248 U.S. 90, 63 L.Ed. 141. The right to take such steps as the members may feel appropriate, needful, or necessary to protect such an invaluable property right is one surely, and we submit certainly, vouchsafed by Sec. 7 of the Act, guaranteeing employees the right “to engage in concerted activities for the purpose of collective bargaining *or other mutual aid or protection*, and (they) shall also have the right to refrain from any or all of such activities.”

Since the respondent union in this case was dealing with Martin as manager of Sound Shingle, and since he at one and the same time occupied an identical role both in Perma Products and Sound Shingle, and since respondent union had beyond any question discovered Martin’s propensity to infringe upon respondent’s union label, respondent union had every reason in good business judgment to be on the alert to protect its label. Its members had an equal reason to act in concert to accomplish the same objective, i.e., to prevent infringement. Knowing Martin, despite warning, to have deliberately infringed upon their label at Chehalis, they had a right to protect themselves against similar infringement at Marysville. The trial examiner’s refusal to permit respondent to explore this issue, and this aspect of the issue, constituted serious prejudicial error.

No Violation 8(b) (4)(A) in Any Event

It is our position that 8 (b) (4) (A) of the Act was intended to proscribe only that conduct on the part of unions which, prior to its enactment, was traditionally embraced within the concept of the term "secondary boycott." This court has aptly stated the proper construction of Sec. 8 (b) (4) (A) of the Act in *Printers Specialty and Paper Union v. LeBaron*, 171 Fed. (2d) 331, page 334:

"In order to narrow the area of industrial strife and thus to safeguard the national interest in the free flow of commerce it has in effect banned picketing when utilized to conscript in a given struggle the employees of an employer who is not himself a party to the dispute. Such we understand to be the purport of Sec. 8 (b) (4) (A) of the Act."

Judge Learned Hand, in *International Brotherhood of Electrical Workers, Local 501, et al., v. N.L.R.B.*, 181 F.(2) 34, aff'd in 341 U.S. 694, defined secondary boycott as follows:

"A gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute, *but upon some third party who has no concern in it*. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." (*Our emphasis.*)

Professor Teller, in his work on labor disputes and collective bargaining (Vol. 1, p. 446) says:

"It has never been suggested that pickets engaged in peaceful primary picketing, may be said to be engaged in secondary picketing where, without picketing third parties, they seek through the

distribution of literature or otherwise to enlist the support of said third parties.” (Our conduct here does not even go that far.)

Sec. 13 of the Act provides:

“Nothing in this act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right.”

Sec. 8 (c) of the Act provides:

“The expressions of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.”

The problem before the court in this case is not unlike the problem presented in *N.L.R.B. v. National Rice Milling Company*, 341 U.S. 665; 95 Law Ed., 1277 (See footnote No. 6, page 672, 1282-3). The protection of the right to engage in a strike given by Sections 7 and 13 of the Act is patently in conflict with the limitations read into Sec. 8 (b) (4) by the Board in its decision here.

The court, in the *Rice Milling* case, cited *supra*, said:

“By Section 13 Congress has made it clear that 8 (b) (4) and all other part of the act which otherwise might be read so as to interfere with, impede or diminish the union’s additional right to strike, may be so read only if such interference, impediment or diminution is specifically provided for in the act.”

Traditionally, a union and its members have been given the right to refuse to work on what they stigmatized as a “scab” product.⁸

There is no specific provision in 8 (b) (4) which declares it to be unlawful for a union to encourage its members to refuse their employment to those using “scab” products, as they are spoken of in the union’s idiom.

The Board has uniformly held that even though the literal language of Sec. 8 (b) (4) (A) would bar the primary strike and the primary picket line, that Sections 7 (8) (c) and 13, when read *in pari materia* with Sec. 8 (b) (4), establishes beyond doubt that a primary strike and a primary picket line are lawful. The Board has even gone further and held that the picket line can be extended to follow the product of the truck of the primary employer to the very door of the secondary employer’s premises. Primary striking or picketing, irrespective of the object thereof, is protected con-

⁸ Cf. *Hunt v. Crumbach*, 325 U.S. 821; 89 L. Ed. 1954, at pages 824 and 1956. Though the decision dealt with a Sherman Anti-trust problem, its language with respect to acts which constitute a legal object of concerted activities is equally applicable in considering whether a boycott is legal or not. “*It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please. * * * A worker is privileged under congressional enactments, acting alone or in concert with his fellow workers, to associate or decline to associate with other workers to accept or refuse to accept, or to terminate a relationship of employment. * * **” (Our emphasis.)

certed activity and has always heretofore been so considered both by the Board and the courts.

In the case at bar there cannot, by definition or by inference, be a secondary boycott for the plain and simple reason that the respondents have not sought to conscript the employees of any other third party employer in their dispute with their own employer—the Sound Shingle Company. Whether or not the employees picket the situs of their employer's plant or refuse to perform services for him is nothing more than direct primary action. Third parties are in no way drawn into the dispute by any action in which the employees are involved. Economic pressure on a primary employer may be exerted at three points: First, at the employer's Labor market; second, at his supply market, and, third, at his sales market¹⁰. Any damage suffered by a primary employer, because his employees refuse to perform services for him, may restrict the employer's labor market, but as such it is lawful, and is not proscribed by Section 8 (b) (4) (A). (Cf. *NLRB v. Rice Milling Company*, 341 U.S. 665. Thus, it is only when a union exerts pressure on a third party—a stranger to the labor dispute—that an issue of secondary boycott is raised. As was said by the court, in *Elliott v. The Amalgamated Meat Cutters*, 91 F.Supp. 696:

“It is to be noted that under Section 8 (b) (4) (A) it is the use of coercion on the third party, in a labor dispute, that characterizes and makes unlawful the activities there set forth.”

¹⁰ Restatements of Torts, Chapter 38, Topic, page 138, 139.

In that case, Judge Ridge refused the Board an injunction under Section 10 (1) of the Act, under a petition alleging a violation of Section 8 (b) (4) (A), on the ground that the union had told all of its members not to work on goods of Western, and told them that if they did so they would be subject to a fine by the Local. In that case a union was involved in a labor dispute with Western. The Court found that there was no evidence before the Court of any threat to call employees of customers of Western out on strike or to bring pressure against third parties, strangers to this dispute. The same is true here. There is no evidence that North Shore or any other customer or person doing business with Sound Shingle Company is being coerced to cease doing business with Sound Shingle Company. As a matter of fact the most that the employees in this case refused to do was to process or work on "scab" shingles. They did not refuse to work for their employer in any other capacity or on any union made product. The situs of the dispute was confined to their own employer's plant and was not even publicized to any supplier or to any consumer. Their refusal here was merely in keeping with their reservation so to do when they entered into a contract. Witness Sarrett's plain notice to Martin prior to the contract.

The evil to which Congress addressed itself, in Sec. 8 (b) (4) (A), is best depicted in the statement of Senator Taft, 93 Congressional Record, 4198, 4199; 2 Leg. Hist. 1106, 1107, 1108:

"This provision makes it unlawful to resort to

a *secondary* boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees * * * . Under the provisions of the Norris-LaGuardia Act it becomes impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to *secondary* boycotts.” (Emphasis ours.)

Congress was of the view that labor disputes should be confined to the employer immediately involved and that unions should be prevented from extending them to other employers by inducing and encouraging the latter’s employees to exert economic pressure in support of their disputes¹².

That the conduct of the respondents here involved is not violative of Section 8 (b) (4) (A) of the Act is, in our judgment, set to rest by two recent decisions, in both of which District Courts refused the Board injunctive relief under Section 10 (1) of the Act. In *Douds v. Sheet Metal Workers Union*, 101 Fed. Supp. 273, rehearing, 101 Fed. Supp. 970, the Ferro-Co. filed a charge with the National Labor Relations Board, alleging that the respondent union had violated Section 8 (b) (4) (A) of the Act. The charge was referred to the Regional Director of the Board for investigation and the Board sought an injunction. The Board’s petition alleged that Diercks Heating Company was in the business of installing heating equipment in public buildings; that the respondent union was the repre-

¹² See *Wadsworth Building Co., Inc.*, 184 F.(2d) 60.

sentative of all employees of Diercks and other members of an association of contractors to which Diercks belonged. For many years Diercks purchased equipment from Ferro-Co. Ferro was not a member and did not employ respondent union members. The petition alleged that the respondent induced the employees of Diercks and other members of the association to engage in a strike or concerted refusal in the course of their employment to use or otherwise handle or work on any products of Ferro-Co. and other manufacturers of radio inclosures who did not employ members of the respondent union.

The Board sought an injunction on the foregoing allegations. Judge Galston, after an extensive discussion of every authority cited by the Board in this case, held that in view of the absence of the evidence of a labor dispute between respondent union with Ferro, it must be concluded that the union's dispute was primary and solely with Diercks. The Court said:

“Where there is no labor dispute other than that with the employer against whom the work stoppage is directed, the fact that the union's concerted refusal to work or handle certain materials affects that employer's business relations with a neutral employer does not require a conclusion that Section 8 (b) (4) (A) has been violated. In the absence of evidence of a labor dispute with Ferro-Co. or any other employer than Diercks (primary employer) it cannot be said there is reasonable cause to believe that a violation of Section 8 (b) (4) (A) has occurred. Therefore it must be concluded that equitable relief here is not warranted.”

Upon reconsideration, the Court adhered to its original opinion, pinpointing its reasoning upon the statement:

“Because the evidence fails to show that respondent in achieving its objective, induced or encouraged the employees of any employer to engage in an unfair labor practice.”

In the case at bar, likewise there is no evidence that respondents have brought pressure to bear upon any employees of any third party neutral employer. There is no evidence of coercive action against a third party neutral employer for the plain and simple reason that there is no third party employer. No pressure is exerted against a third party employer or a third party employer’s employees.

The Court of Appeals of the Second Circuit has, in our judgment, set to rest the only real question in the case at bar. *Conway Express Company v. NLRB* (CCA 2) 195 F.(2d) 906. The case came before the court on a petition to review and set aside an order of the National Labor Relations Board insofar as it dismissed a complaint charging an unfair labor practice under Section 8 (b) (4) (A) of the Act, as amended. The Court found that the 8 (b) (4) (A) violation was bottomed upon the union’s striking an employer bound by an association-wide agreement to employ union men. The employer was one Rabouin, d/b/a Conway Express Company. Rabouin was in the trucking business and had a lease arrangement to lease his equipment to the Middle Atlantic Transport Company, when required by the latter to transport freight for which

it had no equipment. Rabouin used non-union men for all runs conducted by him under his lease arrangement with Atlantic. The union struck Rabouin, on the ground that Rabouin was violating his collective bargaining contract with the union. Rabouin contended that the strike forced him to cease doing business with Atlantic, and in consequence thereof violated 8 (b) (4) (A) of the Act. The Court held that a direct strike against Rabouin, to-wit: refusal by his own employees to work, did not constitute a secondary boycott, even though the incidental effect thereof might cause him to cease doing business with Atlantic under the terms of his lease.

The Court said:

“Of course the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employers, for the purposes of this section, is now well recognized. *NLRB v. International Rice Milling Co.*, *supra*, 341 U.S. at page 671; *NLRB v. Denver Building & Construction Trades Council*, See 341 U.S. 675, 687-688. Sec. 8 (b) (4) (A) forbids only a strike against the latter; primary concerted activity is specifically preserved by Sec. 13, 29 U.S.C.A. Sec. 163. Here, though the source of conflict was Rabouin’s lease arrangement with Atlantic, the union was striking not for the purpose of bringing this to a halt, but, rather, solely to force Rabouin—as a primary employer—to hire only its own members for these runs pursuant to the contract. * * *. The mere fact that petitioner may have been forced to cease the lease arrangement with this neutral was a by-product of his own local labor difficulties and cannot bring the strike

against him within the category of a secondary or prohibited boycott. *NLRB v. Service Trade Chauffeurs*, etc. CCA 2, 191 Fed.(2d) 65.”

One of the most frequently cited cases on the appropriate construction of Section 8 (b) (4) (A) is *Douds v. Metropolitan Architects*, 75 F.Supp. 672, wherein Judge Rivkin, D. C., refused the Board a preliminary injunction under Section 10 (1) of the Act, wherein it appeared that the union picketed its employer (Ebasco), an engineering firm; and likewise picketed “Project,” an engineering firm which sub-contracted a large part of Ebasco’s work, both before and subsequent to the strike. The Court held, after an exhaustive review of the legislative history of the Taft-Hartley Act, and particularly the secondary boycott provision therein, that the term “doing business” in Section 8 (b) (4) (A) did not include the business relationship existing between a primary employer and his own employees; nor did it include the relationship existing between a primary employer (Ebasco) and a third person (“Project”), who had its employees do that work ordinarily reserved to Ebasco’s employees. To so rule, the court held, would permit a primary employer to use strike breakers (“Project’s” employees) merely through the device of sub-contracting its work to third parties. In the instant case, Sound Shingle Company did, prior to January 11, 1952, manufacture its own shingles with shingle weavers who were members of respondent unions and its employees manufactured the entire shingle product. There is not an iota of difference between a strike breaker in that case

and a non-union and non-label product in this case. In any event the work of manufacturing the shingles, heretofore enjoyed by members of the union, is lost. In the place of “fair” or “union label” shingles, primary employer, Sound Shingle, substitutes an unfair non-label shingle and the union grooving employee is asked to complete the finished product and affix thereto the union’s label.

Section 13 of the Act specifically provides that:

“Nothing in this act * * * shall be construed so as to either interfere with or impede or diminish in any way the right to strike * * * .”

Implicit in the right to strike is the right on the part of a union to induce employees to strike their own employer for any legitimate labor end. To protect the jobs of its members is a licit union object. The Supreme Court of the United States has accepted the construction that even though neutrals to a labor dispute might be compelled to cease doing business with an employer, by reason of the exercise of that right by his employees or labor organization having a labor dispute with the employer, that such right is not proscribed or limited by Section 8 (b) (4) (A) of the Act. *NLRB v. International Rice Milling Company*, 341 U.S. 665, 95 L.Ed. 1277. The right to strike even extends to the premises of third parties—strangers to the dispute—if it appears that the picketing in connection therewith is directed at the trucks owned and operated by the primary employer, which trucks, when picketed, are on the employer’s business at some third

party's premises. *NLRB v. Service State Chauffeurs* (C.C.A. 2) 191 F.(2d) 65.

Sec. 8 (b) (4) (A), we submit, was never intended to cripple a union in its right to protect the jobs of its members, and the right to act in concert to uphold union standards, and to resist the use of non-union and non-label goods and products. That, after all, is the sum and substance of the union's interest here. The dispute was a *bona fide* dispute with a primary employer; a plain "bread-and-butter" dispute; and in no sense an ideological dispute over the importation of Canadian shingles.

Board Cases Distinguished

The Board, in its brief, says:

"It (the strike by Sound Shingle employees of its employer, Sound Shingle) constituted the exertion of pressure on the company (Sound Shingle) through inducing its employees to withhold their labor, merely because the working conditions of the employees of another employer were considered unsatisfactory."

The Board then says:

"It is this involvement of a neutral employer in a controversy not his own which Sec. 8 (b) (4) (A) condemns."

The Board then cites four cases which we will now demonstrate have no relation or bearing on a case of this kind. The Board first cites *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675. In that case, Doose & Lintner was the general contractor for the construction of a commercial building

in Denver, Colorado. It awarded a sub-contract for electrical work on the building to a non-union sub-contractor, Gould & Priesner. All the employees of the general contractor and the other sub-contractors of the building were members of unions affiliated with the Denver Building & Construction Trades Council. The Council posted a picket at the job site. All union members employed in different trades at the job site, of course, did not cross the picket line. The evidence showed that the representatives of the District Council called upon Doose & Lintner, the general contractor, and reminded him that Gould & Preisner, the non-union sub-contractor, employed non-union men and that union men could not work on the job with them. The general contractor, Doose & Litner, after the picket line was set up, told the non-union sub-contractor, Gould & Preisner, to get off the job so that Doose & Lintner could continue with the project. Thereafter, all the union men went back to work upon withdrawal of the picket line.

The court found that there was a *long standing labor dispute between the Council and Gould & Preisner*—the non-union electrical sub-contractor—due to the latter's practice of employing non-union workmen on construction jobs in Denver. In this case it is clear that the secondary employer, Gould & Preisner, was non-union; that pressure was brought to bear upon the primary employer, Doose & Lintner; it was not brought to bear to compel Doose & Lintner to employ union men himself or to use only union made products, as in this case, but, rather, brought to bear for the purpose of

eliminating the non-union's secondary employer. The distinction between that case and the case at bar is most apparent and is so clearly explained by Judge Galston in *Douds v. Sheet Metal Workers International Association*, 101 F.Supp. 273, page 278, that we feel impelled to quote from his opinion:

“Implicit in the idea of a secondary boycott is the fact that there is a labor dispute between a labor organization and an employer, and that the boycott charged is directed against *another* employer who is neutral to the dispute. In cases recently decided by the Supreme Court, * * * the facts in each case disclose the existence of a labor dispute between the labor organization involved and the employer with whom another employer is forced to cease doing business because of a boycott directed against the second employer by the labor organization. In each case, the second employer, against whom the ‘boycott’ was directed was regarded by the court as a neutral in the dispute considered to be the cause of the practices of the union found to be contrary to law.”

What has been here said is equally applicable to *NLRB v. United Brotherhood of Carpenters & Joiners*, cited by the Board, 341 U.S. 947, and *NLRB v. Denver Building & Construction Council* (CA 10) 193 F.(2d) 421 and *NLRB v. Wine, Liquor & Distillery Workers Union* (CA 2) 178 F.(2d) 584.

It is sufficient for us merely to point out that in each of those cases there was involved a direct and actual secondary boycott against a secondary employer for the purpose of bringing pressure upon a primary employer, *with whom the union had a bitter labor dispute.*

In those cases there was a primary employer with whom the union had a labor dispute. The union had extended this dispute or carried it to the secondary employer, to induce him to cease doing business with their primary employer, with whom their labor dispute existed. In each case it successfully induced the members of the union, who were under an employer-employee relationship with the secondary employer, to cease work in order that the primary employer might be coerced to accede to the union's demands. It is utterly idle to cite such cases here, for respondent union had not extended or carried its dispute to the employees of any secondary employers; nor has it induced any employees of a secondary employer to cease work or doing business. Respondent union has no business relationship whatsoever with any Canadian employer or employee. In each of the cited cases there was always an actual, existing, namable secondary employer whose employees were affiliated with the striking union.

In this instance, the Board is now seeking to hold that the union has violated Section 8 (b) (4) (A) when the only active dispute in which it is involved is one with the employer for whom its members refuse to work.¹³ Then, no matter how much the Board seeks to avoid the issue here, there is just not a single employer, other than Sound Shingle, engaged in producing non-label shingles—be they Canadian or otherwise—with whom any member of the respondent union is em-

¹³ See dissenting opinion Board Member, Abe Murdock (R. 250, 251) (c).

ployed or with whom respondent union has the slightest labor dispute.

There is here only one employer—Sound Shingle. Where only one employer is involved, there simply cannot be a secondary boycott. No matter how adroit the argument may be, as an exercise of verbal prestidigitation, one cannot (outside of Alice in Wonderland) substitute some mythical non-existing employer in Canada for an actual primary employer present in this and other cited cases. Members of the union in this case, at most, in response to their obligation of union membership, declined to work on non-union or non-label products for their own employer. It was a right which they were entitled to exercise, whether or not the non-label shingles in question originated in Canada, Japan, Bellingham or anywhere else. The union's action was direct and primary and against their own employer. The union made no attempt to conscript any neutral or any third party to come to its assistance or to bring any pressure to bear upon its immediate and sole employer.

The labor dispute in this particular case was directed by Sound Shingle's employees against Sound Shingle. The employees declined to groove a particular carload of shingles belonging to Sound Shingle that did not bear the union label. To argue that the conduct of the employees was directed against the Canadian shingle industry is sheer sophistry. The quarrel was immediately and directly between Sound Shingle's employees and Sound Shingle. Their quarrel with their employer was a very simple one. They objected to being

compelled to groove shingles manufactured unfair to them where, as a result thereof, they would be compelled to attach their union label to the finished product so that the product could be sold in competition with shingles manufactured fair to respondent union. They conceived it to be their basic fundamental right to decline to work upon non-union, non-label or unfair products¹⁴. It was a right that they believed inured to them from their contract of collective bargaining with their employer. It was inherent in their membership in the Brotherhood of Carpenters.

The Board says that this contract is ambiguous¹⁵, and tacitly concedes that if the provision were not ambiguous, and were spelled out in bold faced type, the employees would not be obligated to work on unfair non-label products; that their conduct herein would not violate Section 8 (b) (4) (A). The Board does not find that the union did not in good faith believe that their construction of the contract was reasonable. The Board's argument is one of confession and avoidance. It confesses that were the contract construed as the union in good faith believed it should be construed, the union would have a right to refuse to work on non-label products. We submit that the right to do so to enforce a union's construction of the contract is protected concerted activity. The right to have such a contract necessarily carries with it the right to enforce it.

¹⁴ See exhibits 7, 8, 9 and Exhibit 4, the latter being the collective bargaining contract between the union and Sound Shingle.

¹⁵ Board brief, page 20.

The Board seeks to avoid the importance of *Douds v. Sheet Metal Workers International Association*, 101 F.Supp. 273, *Rabouin v. NLRB* (CA 2) 195 F.(2d) 906 by indulging in an assumption. It is true that the union in those two cases was contractually protected in the conduct complained of, but that was by no means the rationale of the decision. Had the conduct complained of consisted of a secondary boycott under Sec. 8 (b) (4) (A) of the Act the contract could not protect the union. Private contracts which undertake to permit either the union or the employer to do that which he is forbidden to do under the Taft-Hartley Act are repugnant to public policy and necessarily void as a matter of law. It is only because the conduct there complained of was found to be primary rather than secondary that those courts refused to issue an injunction. No matter to what extent, therefore, Petitioner's argument may run, the fatal defect therein is the fact that we have here but one employer—Sound Shingle. Under Sec. 8 (b) (4) (A), it is indispensable to the existence of a secondary boycott that there be *two* employers against whom the union directs its economic pressure. There must be a *primary* employer and a *secondary* employer. If, as in the *Doud v. Sheet Metal Workers* case, the union's action is exerted in a direct line between the union's own employer and the union, the fact then that a secondary employer—in that case Ferro—suffers loss or damage is in law *damnum absque injuria*. It is merely an incidental result of the primary controversy between the union and the primary employer. If the union has the right to do that which it

is doing with respect to the primary employer, it does not lose that right merely because some secondary or tertiary employer may be adversely affected thereby.

CONCLUSION AND SUMMARY

Just what is the Board's holding in this case? Is it that the conduct here complained of is a secondary boycott, as distinguished from a primary boycott, and as such condemned by the Act? Now of course, if this is the Board's position, it necessarily presupposes two employers; one primary, the other secondary. It is traditionally and intrinsically a condition of a primary boycott that it consists of pressure exerted immediately by the employees of an employer, and against their own employer, not some other employer, and particularly not some nebulous or anonymous employer. This follows by the very definition of the term "primary."

How can this be better stated than in the language of former Senator Ball, who collaborated with the late Senator Taft in procuring the enactment of the Taft-Hartley Act, when he said:

"It is the attempt by the employees of employers A, B and C, through their union to dictate not to employer but to his employees, the terms and conditions of the Union under which they shall work. Basically the primary objective of the majority of jurisdictional strikes and secondary boycotts is not the employer, but the employees, over whom control is sought."¹⁷

Again note Judge Learned Hand's definition:

"The gravamen of a secondary boycott is that

¹⁷93 Cong. Rec. 5147; 7683; A 2377.

its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to employees' demands."¹⁸

Let us supplement this with Judge Galston's language:

"Such a (secondary) boycott exists when a labor organization having a labor dispute with employer A induces or encourages employees of employer B, with whom the union has no dispute, to refuse to handle goods or perform services for employer B, with the object of causing B to cease doing business with A, the employer with whom the union is involved in a labor dispute."¹⁹

The reasoning and the effect of these decisions manifestly requires a holding that vis-a-vis a secondary boycott, a secondary employer must be present, against whom the union exerts its pressure, with an object of compelling its primary employer to cease dealing with the secondary employer's products. Now actually, no such situation is here present at all. But, by the exigency of this condition, the Board, driven to find a primary employer, not privy to the dispute here against whom the thrust of the union's concert of action is directed, proceeds by some mysterious process of logomachy to pick out some mythical Canadian employer

¹⁸*I.B.E.W. v. N.L.R.B.*, 131 F.(2d) 34 (C.C.A. 2), Aff'd. 341 U.S. 694.

¹⁹*Douds v. Sheet Metal Workers' Union*, 101 F.Supp. 273; reh. 101 F.Supp. 970 (D.C.E.D. N.Y.).

who is a total stranger to any dealings with Respondent unions whatsoever. By its *fiat* the Board installs the abstract generality described as Canadian employers in the status of primary employer. Ingenious as this may be as a feat of sophistry, and as superficially plausible as the Board seeks to make it appear, such argument can not stand the scrutiny of every day logic and common sense. Everything in the record preponderates against such an unrealistic hypothesis. It does not measure up to the requirements which this court has laid down in *Printers Specialties & Paper v. LeBaron*, 171 F.(2d) 331 (C.A. 9), in this language:

“Section 8 (b) (4) (A) has in effect banned picketing when utilized to conscript in a given struggle the employees of an employer who was not himself a party to the dispute.”

Or on the other hand is it the Board's position that all boycotts are barred, primary as well as secondary? That direct pressure by employees against their employer to achieve a legitimate union objective is barred because the rights of neutrals or strangers are affected? Its position is so ambiguous and janus-faced, so to speak, as to look in two directions at once.

But if that be the Board's contention, it has amply been refuted by what we have hereinbefore said, and the many decisions both of the Board and the courts which we have cited. Congress, it may safely be said, nowhere manifested any intention or purpose, in enacting the Taft-Hartley Act, to strike such a staggering body-blow to concerted union activity. On the contrary,

it has gone to specific pains in the enactment to preserve unimpaired all such cherished union rights.

In the body of our arguments, we have undertaken to make it clear that this court is free to revise the Board when it finds that the record, *considered and taken as a whole*, preponderates against the Board's finding. And of course, the court's power to revise the Board's interpretation and the law, has always been undoubted. For these reasons, we do not hesitate to request this court to set aside the Board's findings and conclusions in this case. It is, we earnestly urge, a far cry from the basic truth in this case—and that fact we believe is amply fortified in the record—to attribute the union's object to be that of precluding the importation or use of Canadian shingles in the United States. Its purpose was much narrower than that. It was a business-like purpose, *ad rem* to very reason of its existence, to impress upon its immediate employer, Sound Shingle, its serious and deeply rooted objection to working on non-union non-label shingles, at the expense of its own members and to the detriment of its union standards of wages, hours and conditions. This objection was none the less valid, because the shingles in question were Canadian-produced. The ultimate and moving factor was that they were non-union, non-label, and sub-standard to respondent union's working conditions. The union's anxiety was to protect and preserve employment rights, and working standards of its own members.

At stake here is a basic tenet of trade unionism. It has been cardinal for nearly a hundred years. It is to

be found as a cornerstone of labor organizations. Every union member is committed to the basic proposition that he will not work on non-union products unfair to his own union. It is the union's natural objective to insist that the product upon which it undertakes to work be wholly union made and in no respect unfair to it. To refuse to work on such a non-union (non-label) product is but a simple means of implementing its legitimate objective. The concert of union members in furtherance of this object falls within the permissive provisions of the Act, "*taken as a whole.*" Sec. 8 (b) (4) (A) shows on its face that it was primarily concerned with barring secondary-boycott procedures; Senator Taft and Senator Ball expounded that view in Congress; the Board has recognized it in many cases hitherto decided; the courts have adopted this same view. It has the support of both reason and the law. It is therefore appropriate that we respectfully request this Court to deny the Board's petition for enforcement.

Respectfully submitted,

WETTRICK, FLOOD & O'BRIEN

GEORGE E. FLOOD

GEORGE O. TOULOUSE, JR.

Attorneys for Respondents.

805 Arctic Building

Seattle 4, Washington

FRANCIS X. WARD,

222 East Michigan Street

Indianapolis, Indiana

No. 13772

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

C. N. PAPADAKIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 22230 CD.

Upon Appeal From the District Court of the United States
for the Southern District of California, Central
Division.

Hon. David W. Ling, District Judge.

OPENING BRIEF OF APPELLANT.

RUSSELL E. PARSONS, CLERK

202 South Hamilton Drive,
Beverly Hills, California,

Attorney for Appellant C. N. (Gus) Papadakis.

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No. 13772
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No. 22230 CD.

Upon Appeal From the District Court of the United States
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Hon. David W. Ling, District Judge.

OPENING BRIEF OF APPELLANT.

Statement of Basis of Jurisdiction.

This is an appeal from a judgment by the District Court of the United States for the Southern District of California, Central Division, after a trial with a jury, finding the appellant and his father, Nick Papadakis, guilty of evading income taxes for the years 1945, 1947, 1948, 1949 and 1950 (U. S. C., Title 26, Sec. 145(b)), by filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District fraudulent income tax returns and evading the payment of tax thereon. The appellant's father was fined

\$8,000.00, and the appellant, C. N. Papadakis, was sentenced to ten months' imprisonment and to pay a fine in the sum of \$200.00 on each of the Counts, One to Sixteen, inclusive, of the indictment, the periods of imprisonment to begin and run concurrently [Clk. Tr. pp. 88, 89, 90].

Following the sentence the appellant, C. N. Papadakis, duly filed a notice of appeal within the time prescribed by law [Clk. Tr. p. 92], and appellant was continued upon bail by the trial judge, pursuant to Rule 46(a)(2) of the Federal Rules of Criminal Procedure, pending the appeal. The District Court had jurisdiction under Title 18, Sec. 3231, and this Court has jurisdiction under Title 28, Sec. 1291; and under Rules 37, 38 and 39 of the Federal Rules of criminal procedure for the District Courts.

Statement of the Case.

The Nature of Appellant's Business.

The appellant's father, Nick Papadakis, was born in Greece. He came to the United States in 1902 and settled in Los Angeles County in 1903. He moved to San Pedro, California, in 1910, where he has lived ever since with his wife and family.

The appellant, C. N. Papadakis, who is commonly known as "Gus," and to whom we refer, with the Court's indulgence, hereafter as Gus, was one of several children [Rep. Tr. pp. 802, 804, 805]. The father, Nick Papadakis, was continually engaged in business, having started as a peanut vender in the Temple block in Los Angeles. In 1910 he opened a restaurant in San Pedro, and from 1910 on he has been continually engaged in operating restaurants, hotels, and liquor stores. He, also, acquired many pieces of property over that period of years.

The appellant, C. N. Papadakis, has acquired a college education, and while doing so, helped his father in and about the hotel and the liquor stores.

The Records of the Appellant's Business.

Over a period of years, the appellant's father Nick Papadakis, had kept various records of his business, including a simple book kept at the hotel. Most of their business passed through the banks, as evidenced by voluminous packages of checks, deposit slips and bank records, as evidenced by the Government's Exhibit 94.

At the liquor stores, records were kept of sales and disbursements. Largely, the business was conducted by making the deposits in the bank under the name of Anchor Liquors, and the bills were paid by check, with the exception of small amounts which were paid out in cash.

Over a period of years the father and the appellant had consulted with an accountant by the name of Hoffman in San Pedro, who aided in the keeping of the records of various enterprises operated by the father and his family.

The Indictment.

The indictment was in sixteen Counts:

Count One charged Nick Papadakis and C. N. Papadakis, the appellant, with evading a large part of the income tax due the United States of America by the defendant, Nick Papadakis, for the year 1945; further charging the filing of a false and fraudulent income tax return for that year. Computed on the community property basis his net income was alleged to be \$16,580.33, whereas it was \$43,495.15;

Count Two charged Nick Papadakis and C. N. Papadakis, the appellant, with attempting to evade income tax due for the year 1945 by filing a false return on behalf of Katina Papadakis, the wife of Nick and the mother of the appellant, Gus, alleging that on community property basis her net income was \$16,580.33, when it was actually \$43,495.15;

Count Three charged Nick Papadakis and C. N. Papadakis, the appellant, with evading income tax for the year 1947 on behalf of Nick by filing a false return, setting up net income on a community property basis as \$4,817.44, whereas it was \$25,024.59;

Count Four charged Nick Papadakis and C. N. Papadakis, the appellant, with filing a false return for the year 1947 on a community property basis for Katina Papadakis, the wife of Nick and the mother of appellant, Gus, alleging the same figures as in Count Three on a community property basis;

Count Five charged Nick Papadakis and C. N. Papadakis, the appellant, with filing a false return for Nick for the year 1948, alleging that on a community property basis the net income was \$6,429.06, whereas it was \$31,574.53;

Count Six charged Nick Papadakis and C. N. Papadakis, the appellant, with filing a false return for Katina Papadakis for the year 1948, alleging the same figures as in Count Five on a community property basis;

Count Seven charged Nick Papadakis and C. N. Papadakis, the appellant, with filing a false return for Nick Papadakis for the year 1949, alleging that on a community property basis the net income was \$9,586.53, whereas it should have been \$12,539.00;

Count Eight charged Nick Papadakis and C. N. Papadakis, the appellant, with filing a false return for the year 1949 for Katina Papadakis, the wife of Nick and the mother of the appellant, Gus, the figures being the same as set forth in Count Seven, it being on a community property basis;

Count Nine charged C. N. Papadakis, the appellant, alone, with filing a false return for the year 1946, alleging that on a community property basis the net income was \$4,038.95, when it was actually \$5,910.27;

Count Ten charged C. N. Papadakis, the appellant, alone, with filing a false return for 1946 on behalf of his wife, Helene Papadakis, the figures being the same as in Count Nine, it being a community property basis;

Count Eleven charged C. N. Papadakis, the appellant, alone, with filing a false return for the year 1947, alleging that on a community property basis the net income was \$2,921.69, whereas the net income was alleged to be \$7,330.84;

Count Twelve charged C. N. Papadakis, the appellant, alone, with filing a false return for the year 1947 on behalf of his wife, Helene Papadakis, the figures being the same as in Count Eleven, it being on a community property basis;

Count Thirteen charged C. N. Papadakis, the appellant, alone, with filing a false return for the year 1948, alleging a net income in the sum of \$4,584.85 whereas on a community property basis it was \$9,092.30;

Count Fourteen charged C. N. Papadakis, the appellant, alone, with filing a false return on behalf of his wife, Helene Papadakis, for the year 1948, the figures being

the same as alleged in Count Thirteen, it being on a community property basis;

Count Fifteen charged C. N. Papadakis, the appellant, alone, with filing a false return for the year 1949, alleging a net income in the sum of \$6,506.40, whereas on a community property basis it was \$8,795.64; and

Count Sixteen charged C. N. Papadakis, the appellant, alone, with filing a false return on behalf of his wife, Helene Papadakis, for the year 1949, the figures being the same as alleged in Count Fifteen, it being on a community property basis [Clk. Tr. pp. 2 to 15, incl.].

A motion to dismiss the indictment was filed and made, as was a motion for a bill of particulars [Clk. Tr. pp. 16 to 27].

The motion to dismiss was denied.

The motion for a bill of particulars was granted.

The bill of particulars is found at pages 28 to 34, inclusive, of the Clerk's Transcript, and afforded the defendant and appellant practically no information.

Thereafter, a motion for a supplemental bill of particulars was made on behalf of C. N. Papadakis. Upon hearing a motion for the supplemental bill of particulars it was denied [Clk. Tr. pp. 36 to 43].

The Judgment.

The defendants were found guilty: Nick Papadakis on Counts 1 to 8, inclusive, with which he had been charged, and Constantine N. Papadakis, or Gus Papadakis, on Counts 1 to 16, inclusive, on which he had been charged.

Motions for acquittal were made.

A motion for a new trial as to defendant, C. N. Papadakis, was made.

Both motions were denied.

Nick Papadakis was fined \$1,000.00 on each of Counts 1 to 8, inclusive, and Constantine N. Papadakis, or Gus Papadakis, was sentenced to 10 months' imprisonment, and a fine of \$200.00 on each of Counts 1 to 16, inclusive, the periods of imprisonment to begin and run concurrently [Clk. Tr. pp. 86 to 91, incl.].

The Evidence.

Evidence was offered by the Government with reference to numerous real estate transactions over a long period of years by Nick Papadakis. These showed the purchases of many pieces of real estate in and about San Pedro and, in many instances, the terms of various escrows [Rep. Tr. p. 87]. This was largely done by stipulation and included testimony with reference to bank balances over a period of years maintained by Nick Papadakis and, also, testimony relating to purchases of United States War Bonds and United States Treasury Notes on behalf of Nick Papadakis; also testimony with reference to loans by the Security-First National Bank to Nick Papadakis; also testimony with reference to signature cards of Nick Papadakis, C. N. Papadakis and other members of the Papadakis family who had access to the bank accounts maintained in San Pedro [Rep. Tr. pp. 87 to 127].

This testimony was received only as to Nick Papadakis [Rep. Tr. p. 95].

Martha O'Sullivan, a certified public accountant, employed by the defendants, identified amended returns and a net worth statement on behalf of Nick and Katina

Papadakis, which she had prepared [Rep. Tr. pp. 45, 46], stating that she had used bank statements, cancelled checks, rent record books, records of returns of the stores, information taken from leases, a day book that showed records of some expenses, and a month to month record book showing the rent account of the LaSalle Hotel. From these she prepared a document known as Government's Exhibit 34 [Rep. Tr. pp. 45 to 48]. A copy of this Exhibit is attached hereto in the appendix. This document had been forwarded to the Treasury Department in San Francisco by the accountant about September 7, 1951.

Martha O'Sullivan testified that she had prepared a group of "tentative amended returns" on behalf of Nick and his wife Katina Papadakis. These were prepared from bank statements, cancelled checks, the hotel books, month to month rent books and computation of rentals due on leases, covering the years 1942 to 1949, inclusive, for Nick and Katina Papadakis. They were marked as Government's Exhibit 35 [Rep. Tr. pp. 52 to 54].

Harold Wilbur testified that he was a revenue agent assigned to this investigation, that about June, 1949, he met Nick and C. N. Papadakis at the store in San Pedro, and explained that he desired to examine their books, that they were about to make an investigation. He asked for the books and records and C. N. Papadakis produced two books for a store at 1227 Pacific, San Pedro, and he then inquired of Gus as to the whereabouts of other books, and Gus then called the other stores and the books were immediately delivered [Rep. Tr. pp. 218 to 220]. That he wanted to know whether the books indicated whether the expenditures and receipts were by check or cash, and Gus indicated how they had determined that; that for

some days thereafter he continued examining the books and footing the pages in the books. A summarization of the books continued over a period of days; that after he prepared the totals of merchandise purchases for some years there appeared to be a substantial difference in the years 1946, 1947 and 1948 between merchandise purchases and the amounts claimed on income tax returns for those years. That in a conversation with Gus Papadakis, Gus indicated there were boxes of invoices and records in storage [Rep. Tr. pp. 227, 228].

Harold Wilbur testified that from time to time he had conversations with Gus Papadakis and upon occasions they discussed the procedure of handling income tax matters before the Department, such as conferences, etc.; that he informed Gus Papadakis that it appeared to him there was a substantial discrepancy and he wanted to get an explanation if he could [Rep. Tr. pp. 233 to 235].

That on one occasion in the Pacific Street store, Gus was clerking in the front part of the store, and he requested Gus to come to the back part of the store, which he did. They were leaning against some cases of liquor and Gus was on one side and he on the other side; that he then stated to Gus that he did not think he was getting full cooperation in the matter and he wanted to know if there was some explanation; that Gus Papadakis then took a red pencil out of his pocket and on a small piece of paper wrote the figures \$1,000.00, and asked the witness if he would be interested, to which he replied that he was not trying to preach to Gus, or anything like that, but that he would be a fool to stick his neck out for something like that; that Papadakis then struck out the \$1,000.00 and wrote \$1,500.00; that he then laughed at Gus; that

this was all in a friendly spirit; that he was not mad at Mr. Papadakis and Mr. Papadakis was not mad at him; that he stated to Gus that he simply could not take the \$1,500.00 as he was scrutinized by other agencies and it would be impossible for him to do anything like that; that his boss in Los Angeles was fully cognizant of all the to-date results of the examination and he could not cover up anything [Rep. Tr. pp. 237, 238]. He said he then told Papadakis he better destroy the slip of paper, which he did.

The witness stated that he then switched his auditing work from the Anchor Liquor Store to the LaSalle Hotel [Rep. Tr. pp. 244, 245].

That he next saw Nick Papadakis with his attorney, Murray Chotiner, and they went to the safety deposit box of Nick Papadakis at the Security Bank in San Pedro and inventoried the items which consisted of \$54,500.00 in United States Treasury notes; that in a conversation with Nick Papadakis as to the source of the bonds, he stated that he had acquired them in 1946 at the Security Bank in San Pedro; that he had cashed about \$31,000.00 in War Bonds to buy the treasury notes; that he had bought the War Bonds between 1941 and 1946.

That upon completing the inventory they returned to the Pacific Street store where they had a further discussion about the history of the liquor stores and at that time Nick Papadakis told him that during March or April of 1946 they took an inventory of the stores and it was about \$25,000.00; that the stores were then sold to his two sons, Gus and George Papadakis, and that they were to pay him for the inventory; that they had paid

him \$21,000.00 and that after the boys paid him he had kept the cash at home [Rep. Tr. pp. 246 to 249].

That in December of 1949, a conference was held at the residence of Nick Papadakis; that Murray Chotiner, his attorney, Gus Papadakis and Agent Vitello were present; that they were at that time having a discussion for the purpose of obtaining figures to prepare a tentative net worth statement; that Nick Papadakis was attempting to assist them; that Mr. Papadakis was asked how much cash he had on hand, and he stated that he had been a bootlegger during prohibition days and had accumulated a lot of money. He stated that when Roosevelt was first inaugurated he had about \$300,000.00, about one-half of which was in cash and the rest in real estate [Rep. Tr. pp. 249 to 251].

The witness testified that he had prepared a "balance sheet" which represented a statement of the net worth of Nick Papadakis for various years commencing with December, 1941, and running through December, 1948. The document was identified as Plaintiff's 73 [Rep. Tr. p. 257].

The witness testified that he had prepared a work sheet or a summary as a result of his investigation into the bank deposits of Nick Papadakis. This was received as the Government's Exhibit 74, a copy of which is attached hereto in the appendix [Rep. Tr. p. 262].

The witness testified and an analysis of this statement showed large currency deposits over a period of years in the bank account of Nick Papadakis.

The witness testified that in March of 1950, in the law office of Murray Chotiner there was a conference at which Nick Papadakis, Gus Papadakis, Murray Chotiner and Agent Vitello and himself were present; that they dis-

cussed a net worth statement which had been summarized and typed and was ready for signature. The document was identified as Exhibit 75, a copy of which is attached hereto in the appendix [Rep. Tr. p. 267]. The items were pointed out to Nick Papadakis and he stated that the items appeared to be correct [Rep. Tr. p. 268]. The document was then signed by Nick Papadakis.

The agent testified that on March 22, 1950, he and Agent Vitello had visited Gus Papadakis at his residence in San Pedro, where he met his wife Helene. They asked Gus where he obtained the money for the purchase of his home, and Gus stated that his father had given him \$5,400.00; that they then had a discussion as to the inventory at the Anchor Liquor Stores at the time he took over, and he stated that it was between \$24,000.00 and \$30,000.00. [Rep. Tr. pp. 273, 274.]

There was next testimony offered with reference to a conversation between Nick Papadakis and Ernest Papadakis, another son, at the LaSalle Hotel in San Pedro, at which time the agent showed them a rent schedule, Exhibits 77-A and B. [Rep. Tr. pp. 274, 275.] These were prepared from a rental income book kept by Ernest Papadakis and which had been given to the agent by Ernest Papadakis for examination. They went over each item of property and he informed them that it appeared some items were not in the book, and Nick replied that he did not understand why no rent had been shown because it had been collected. [Rep. Tr. pp. 276, 277.] In a conversation with Nick and Ernest Papadakis, Nick stated to the agent that in the latter years the rental book had been kept by Ernest Papadakis. [Rep. Tr. p. 288.] That occasionally he made a few entries himself and sometimes his daughter would make an entry; that

with regard to hotel receipts as distinguished from rental properties, daily summaries were made by persons working in the hotel. [Rep. Tr. p. 289.]

There was then a conversation related between the agent and Mr. Nick Papadakis in which the agent stated that he informed Mr. Papadakis there seemed to him to be a difference in the rental book which had at first been given to him and one which had subsequently been given to him by Ernest Papadakis, and he, the agent, wanted to know why this difference. During the course of this conversation Nick Papadakis replied "I do not understand." The agent stated that he found items which had previously not appeared. [Rep. Tr. pp. 291-297.]

On cross-examination Agent Wilbur testified that he had met Gus Papadakis at the 1227 Pacific Street Store, San Pedro, and, after informing Mr. Papadakis who he was, the books were turned over to him concerning the liquor business by Mr. Gus Papadakis, and he informed Gus Papadakis that he wanted all the books and Gus explained that each store had two books. That Gus immediately sent for the books and had them delivered to the agent that day. [Rep. Tr. pp. 314, 315.]

That throughout the investigation Gus Papadakis cooperated with him; they went to the liquor stores, they examined the cash registers, and they discussed the manner of keeping the books and how the receipts and disbursements were handled. That Gus Papadakis stated he made it a practice to go around to each of the stores on Monday morning and gather up the cash on hand at the stores, make a reconciliation of the receipts of the day and tally the receipts with slips that had been maintained by the clerks at the stores; that a short summary for that particular store was made and this

summary was given to the clerks in the store to enter into the books; that Gus then took the receipts to the bank and made deposits. [Rep. Tr. pp. 322, 323.]

That with reference to purchases, Gus Papadakis informed the agent that the 1227 Pacific Street store functioned as a central purchasing department and as a warehouse and that purchases for the various commodities, beer, wine, liquor, etc., were paid for by check and these entries in recent years had been entered in the books at the Pacific Street store. [Rep. Tr. pp. 326, 327]. That in the store where the agent was working where the records were kept he asked for invoices and there were "literally hundreds of invoices there showing the purchases of liquor, beer, wine and various articles sold in the stores." [Rep. Tr. pp. 328, 329.]

That Gus Papadakis stated that most purchases were paid for by check. That generally speaking if the purchase was less than \$50.00 it might be paid for in cash at the particular store. [Rep. Tr. pp. 329, 330.]

That in his discussions with Gus Papadakis, Gus had told him that he had been in the service for some time but returned in 1946 and went back into business. [Rep. Tr. pp. 331, 332.] That Gus "appeared to be very cooperative." He gathered up bank statements, and cancelled checks running into bundles which were given by Gus to the agent for examination and audit. [Rep. Tr. pp. 332, 333 and 334.] That he was given a large package of deposit slips which he examined. [Rep. Tr. pp. 336, 337, 338], and that he "did not recall with regard to Anchor Liquor any irregularity in the deposits." [Rep. Tr. p. 338.] That he only saw Gus at the Hotel two or three times. That he made spot checks with reference to invoices and with checks to see if they corresponded

and he found that they did. That he made some check of the inventory.

Leonard Mattis testified that he was employed by an accountant, Paul Hoffman, in 1948, at which time Mr. Hoffman was in poor health, but was maintaining an office in San Pedro. That Mr. Hoffman was a public accountant. That he met Gus Papadakis in 1948 and was present at a conversation in Mr. Hoffman's office, when Mr. Hoffman stated that they had been cutting the gross and changing the inventory from year to year, but had been getting away with it for years. Mr. Mattis then asked Mr. Hoffman if it was not risky, and Hoffman stated that they had been getting away with it for years. [Rep. Tr. pp. 130, 132.] That at that time he was preparing returns for 1947 and had the work papers in front of him. That he had some work sheets. [Govt. Exs. 68 and 68-A.]

That at that time the Papadakis family was remodeling the hotel, and in March of 1948, Mattis had a conversation with Gus in which Gus said that he had spent \$21,000.00 or \$22,000.00 in remodeling the hotel. That Mattis stated he thought most of it should be capitalized but Gus said, "No, we will put it down as repairs and improvements." [Rep. Tr. pp. 134, 136.]

Mattis stated that he made out the returns for 1947 for C. N. Papadakis. [Rep. Tr. p. 139.] That Government's Exhibit 29 was prepared by him on behalf of C. N. Papadakis and the LaSalle Hotel. [Rep. Tr. p. 142.]

Mattis stated that on Exhibit 29 the amount of receipts shown was \$66,958.17, but the original figure given to him by Gus Papadakis was \$74,958.17, and the only ex-

planation given was to decrease the tax liability. [Rep. Tr. pp. 143, 144.]

Mattis stated that he had work papers for the year 1948, and that he had a discussion with Gus Papadakis with reference to the making up of the 1948 return. That Gus brought him in some work sheets and he prepared a tentative return [Govt. Ex. 69], for the LaSalle Hotel [Govt. Ex. 69-A], which showed gross income to be \$82,615.82 and net income \$27,646.23. That he then showed it to Gus and Gus stated, "It is too damned high, we will have to cut it down." [Rep. Tr. pp. 145, 147.] That Gus then said, "We will have to cut the gross" and Mattis then cut it approximately \$10,000.00. [Rep. Tr. pp. 147, 148.]

That Mattis prepared Government's Exhibit 30 which relates to the LaSalle Hotel, and the difference between the tentative return that he had prepared and Exhibit 30, as to gross income, was \$10,000.00. [Rep. Tr. pp. 148, 149.] That the return was signed by Nick Papadakis. That he prepared the final return for Anchor Liquor Stores for the year 1948. [Govt. Ex. 27.]

That in March of 1948, Mattis had a conversation with Gus in which Gus stated that he thought the tax liability for the hotel was too high, and he said to try cutting it \$10,000.00, and Mattis did. [Rep. Tr. pp. 159, 160.] That this left the results \$17,000.00 instead of \$27,000.00. Mattis, however, identified Government's Exhibit 30, which shows that Mattis used the \$27,000.00 figure and not the \$17,000.00 figure. [Rep. Tr. pp. 160, 161.]

That Mattis had a conversation with Gus in March of 1949 in which Gus said the purchases could be raised, and Mattis identified Government's Exhibit 71 as a tenta-

tive return which showed one-half the partnership interest as \$15,350.65. That the tentative return was marked Government's Exhibit 71-A. That Gus suggested that he would either have to raise the purchases or juggle the inventory. That Mattis then raised office supplies, refunds, truck repairs, advertising, window cleaning, burglar alarm and purchases so as to make up a total of \$15,000.00. [Rep. Tr. pp. 163, 164.] That the tentative return showed approximately \$30,500.00 net profit, but the final return showed \$18,339.00. [Rep. Tr. pp. 164, 165.]

That Mattis identified a work sheet given to him by Gus Papadakis in 1949. [Govt. Ex. 72.] That at that time Gus told him to make out a tentative return and he prepared a tentative return. [Govt. Ex. 72.]

That in preparing the return the inventory figured \$55,517.95, but Mattis used the figure \$50,517.95 as shown by Government's Exhibit 28. [Rep. Tr. pp. 173, 174.]

Mattis stated that in the summer or spring, after the filing period in 1949, he had a discussion with Gus in which Gus told him an agent was checking over the books pretty thoroughly, and that Gus asked Mattis what he thought of giving the agent a little reward; that Gus said "I will just put down \$1,000.00 on a piece of paper and show it to him and tell him to take it easy." Mattis stated to Gus that this might be a trap; that it might be just what the Government is waiting for. [Rep. Tr. pp. 178, 179.]

On cross-examination, the witness Mattis, when asked if he knew he was committing a felony in making these alterations in figures while preparing the returns, replied,

“I did not at the time, or maybe I knew it at the time, and maybe I did not” [Rep. Tr. p. 185].

The witness Mattis stated that he knew that the Revenue Code relating to persons who aid in the preparation of returns made it a felony to aid in the preparation of a false return, and that notwithstanding that he went ahead and prepared these returns, some of which he even filed. [Rep. Tr. pp. 185, 186.]

The witness Mattis identified Government's Exhibit 68-A as a work sheet in his handwriting in its entirety. [Rep. Tr. p. 187.]

The witness Mattis identified Government's Exhibit 68-B as being entirely in his handwriting; also, Government's Exhibit 68-C. [Rep. Tr. pp. 189, 190 and 191.] The witness Mattis also identified Government's Exhibit 68-D as being entirely in his handwriting; that all of these work sheets that he used were in his handwriting and were used by him in connection with the preparation of Anchor Liquor partnership and the LaSalle Hotel returns for the year 1948. [Rep. Tr. p. 195.]

The witness Mattis testified that Government's Exhibit 69 was all in his handwriting; that this entire file to which his attention was directed, Government's Exhibits 69 and 69-A, had been in his possession until 1949 when he gave it to Internal Aevenue Agent Charles Vitello, who was working on this case. [Rep. Tr. p. 200.] That this was also true of Government's Exhibit 68. [Rep. Tr. p. 201.] That he also gave Government's Exhibit 71 to Mr. Vitello; that he gave Government's Exhibit 71 to Mr. Vitello in 1949, in the Federal Building in Los Angeles. That he gave Government's Exhibit 72-B, which he stated was all in his handwriting and prepared by

him, to Mr. Vitello in 1950. That he first met Mr. Vitello in 1949 in the San Pedro office of the Bureau of Internal Revenue. [Rep. Tr. pp. 208, 209.]

The witness Mattis testified that he had previously written a letter to the Department of Internal Revenue about the Papadakis affairs, which letter he wrote in September or October of 1948; that in October of 1949 he was aware that as an informer he might recover up to ten per cent of any money recovered by the Government. [Rep. Tr. p. 210.] The witness Mattis testified that he knew this recovery rule was in existence when he wrote the letter to the Department of Internal Revenue, and that he continued to prepare returns for the Papadakis family as late as the year 1952. [Rep. Tr. p. 211.] The testimony is quoted verbatim as follows:

“By Mr. Parsons: You knew that rule was in existence when you wrote that letter, didn’t you?

A. Yes.

Q. And as late as this year, 1952, you prepared the returns for these people, didn’t you? A. Yes, sir.

Q. And at all times during that time, up to 1952, you were in touch with Government agents and were discussing with them the business of these people as discussed with you, isn’t that right? A. Yes.”

The witness Mattis stated that in his discussions with Gus concerning the LaSalle Hotel, they discussed expenditures in connection with the painting and repairing of toilets, bathrooms, the lobby and things of that sort, and they discussed what might be allowable as maintenance items and what should be properly set up

and capitalized, and that he, as an accountant, recognized that these items and matters were subject to numerous conclusions. [Rep. Tr. pp. 213, 214, 215.]

Charles Vitello testified that he was a special agent for the Bureau of Internal Revenue, and that he was assigned to the investigation in this case; that he had discussions with Nick Papadakis as to his assets, and that he told Nick that from his assets it appeared that he had access to funds which were not accounted for by his tax returns for 1942 to 1949. That in a discussion at which Mr. Murray Chotiner was present, it was stated that Mr. Papadakis had about \$300,000.00 in 1933. [Rep. Tr. pp. 454-456.]

The witness Charles Vitello related his investigation, stating that he had numerous discussions with Nick Papadakis, some with C. N. Papadakis and some with other members of the family, and that after the investigation he prepared Government's Exhibit 75; that he also prepared Government's Exhibit 76.

The witness Charles Vitello testified that based on the testimony in this case, and the exhibits he had prepared, Government's Exhibit 8, showed a computation of the unreported income for Nick and Katina Papadakis for the years 1945 to 1949, inclusive; that he had prepared, based upon the evidence and testimony in the case, a net worth statement of Nick and Katina Papadakis for the years commencing December 31, 1944, to December 31, 1949, inclusive. [Govt. Ex. 89.] This exhibit was explained by the witness. [Rep. Tr. pp. 505 to 514, incl.]. The witness then explained Government's Exhibit 89. [Rep. Tr. pp. 514 to 518, incl].

Gus Papadakis testified in his own behalf that he had never entered into any arrangement with his father to prepare any false returns and that he had kept the books at the liquor stores and only for a short time had aided his father in keeping records at the hotel, and to the best of his ability, he had kept his records fairly and accurately. Gus denied ever having had any discussions with Mattis wherein he had asked that the inventory be raised or lowered, or purchases be raised or lowered, or that he had done anything to attempt to defeat income taxes except what he felt he legitimately might do, with reference to expenditures by way of maintenance, various expenses, etc. [Rep. Tr. pp. 620-622.]

Martha O'Sullivan testified that she was a certified public accountant attached to the firm of Gabrielson, O'Sullivan, Poulson & Co., and that she had made a study of the assets, accounts and records of Nick and Katina Papadakis, and had prepared tentative returns and various documents which, in the interest of brevity, are not referred to here, because we have referred to her testimony extensively and identified her exhibits in a discussion of the sufficiency of the evidence, and we respectfully direct the court's attention to the summary of her testimony. Considerable other testimony was offered by members of the Papadakis family, all generally to the effect that they denied making any false entries or in any way attempting to defraud the Government, and then there was substantial evidence offered by numerous business men, judges, etc., as to the good character of Nick Papadakis.

Specifications of Error.

I.

It was error to permit the evidence against Nick Papadakis on the net worth and expenditure method and other matters to be used against C. N. or Gus Papadakis. It was hearsay as to him.

II.

The evidence was insufficient against the appellant C. N. (Gus) Papadakis.

III.

The Court erred in failing to properly instruct the jury on the subjects of entrapment, accomplice, and the duty of each individual juror.

A. The informer, Mattis, testified concerning conversations with Gus with reference to expenses, inventories, purchases, and how the net income might be reduced. Mattis testified he prepared the returns for the Papadakis family for all of the years involved and through 1952, and that when he filed the returns he knew they were false. That he had been communicating with the Government agents since 1949; that he had written a letter to the Government and expected to be reimbursed under the rule providing for 10% of any recovery effected by the Government. We contend that it was a form of entrapment, and the Court erred in failing to instruct the jury upon the subject of entrapment, notwithstanding our request so to do and proffered instructions upon the subject.

By reason of the facts in this case, the jury might well have believed that Gus Papadakis was being entrapped. This was brought to the Court's attention upon more than one occasion [Rep. Tr. pp. 1074, 1075], as follows:

"Mr. Parsons: In view of the fact that in the interest of brevity we on behalf of C. N. Papadakis, we have been adopting the instructions given by him and I join in the same objections just made to the Government's instructions offered and given by the court, offered to the court and given by the court and I join in the objections to the omissions of instructions provided by Nick Papadakis which by understanding were adopted by C. N. Papadakis.

And in addition thereto may I also point out that the defendant, C. N. Papadakis, offered to the court certain objections specifically relating to his own account. However, they are in part applicable to the other defendant. That is particularly instruction 14, the group of instructions requested by the defendant C. N. Papadakis on file herein.

Then instruction 15, instruction 16, instruction 17, instruction 19. It will be borne in mind that those instructions particularly related to the informer, Leonard Mattis, and while I realize the court does not agree with me, it is still our contention and we assert that he was an informer and it was a form of entrapment and the evidence in our humble opinion clearly establishes it and the case now goes to the jury without one word of explanation as to how such a defense should be considered or how the evidence of the informer, Leonard Mattis, should be considered except as to the broad general instructions as to the credibility of witnesses.

And I also adopt the argument heretofore made. I think we discussed this quite fully in chambers with your Honor and with considerable latitude and liberty and I adopt those arguments.

The Court: All right.

Mr. Parsons: Thank you."

and by proffered instructions, as follows [Clk. Tr. pp. 56, 57]:

"DEFENDANT C. N. PAPADAKIS' REQUESTED IN-
STRUCTION No.

You are instructed that the first duty of officers of the law is to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Therefore, when the criminal design originates, not with the accused, but is conceived in the minds of the Government or persons working in conjunction with Government officers and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor, and, therefore, if you find from the evidence in this case that the accused in this case were entrapped, you must acquit the accused.

Butts v. United States, 273 Fed. 35, 38;

Newman v. United States, 299 Fed. 128, 131."

The next requested instruction [Clk. Tr. p. 57] is as follows:

"DEFENDANT C. N. PAPADAKIS' REQUESTED IN-
STRUCTION No.

In arriving at your verdict, you have a duty to take into consideration the motives and the statements of the prosecution's witnesses, which include the officers and anyone working in conjunction with the officers."

The next proffered instruction [Clk. Tr. p. 57] is as follows:

“DEFENDANT C. N. PAPADAKIS’ REQUESTED IN-
STRUCTION No.

If you believe that the defendants were entrapped by persons or a person working in conjunction with agents of the Government, it is immaterial if they thus committed some offense. If you believe the defendants were entrapped, it is your duty to acquit them.”

The next proffered instruction [Clk. Tr. p. 58] is as follows:

“DEFENDANT C. N. PAPADAKIS’ REQUESTED IN-
STRUCTION No.

You are instructed that if the accused in this case were entrapped through the efforts or design of Leonard Mattis, then you must acquit the accused.”

These instructions were all refused by the Court, and the only instruction given by the Court on the interest of witnesses or how to judge the testimony of witnesses, was the general instruction upon the credibility of witnesses [Rep. Tr. p. 1066], as follows:

“You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony or by evidence affecting his character for truth, honesty and integrity or his motives or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may

disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony."

B. The informer, Mattis, testified that he had worked with Gus Papadakis and his father, Nick; that from time to time when income tax returns were prepared, Gus brought work sheets to him; that they discussed the matter; they discussed expenditures, purchases, how they might decrease purchases and increase expenses; how they might charge certain items as expense which might otherwise have been classed as capital investments, all looking toward the reduction of the income tax to the Government. That after obtaining this information he prepared the returns, that some of the returns which he prepared and filed he knew to be false when he filed them. It is our contention he was an accomplice without question of doubt, and no instruction was given by the Court upon the subject of accomplice. The only instruction given was the general instruction relating to the credibility of witnesses.

C. We next respectfully direct the Court's attention to the instruction given by the Court with reference to how the testimony of the defendants should be considered. This is especially important in view of the failure of the Court to properly instruct as to entrapment and accomplice.

D. The Court failed to instruct the jury properly upon the duty of each individual juror to render his or her individual opinion. All that was said upon this subject was that the jurors were instructed to discuss the case and that jurors were expected to reach verdicts, if possible, but that each juror if he had an opinion, after discussing it with his fellow jurors, if he felt that he should change, he should change his opinion. We assert the law was not properly stated to the jury.

Summary of the Argument.

1. It was and is our contention that all of the testimony relating to the net worth and expenditure method adopted by the Government as against Nick Papadakis was hearsay in so far as Gus Papadakis was concerned. The evidence showed acquisition by Nick Papadakis, the father, of properties over a long period of years, much of which was done prior to the majority of Gus, and some before his birth, and considerable while he was away in the service, matters with which Gus had no connection. Conversations between Nick Papadakis and the agents and opinion evidence by the agents as to the net worth of Nick were all admitted, and went in as against Gus. It was hearsay. Some particularly vicious testimony was admitted concerning conversations between the revenue agents and Nick, the father, and Ernest, his brother, in the absence of Gus, concerning the LaSalle

Hotel and concerning entries in books. In these conversations the agents accused Nick and Ernest of altering the books. This information was all considered by the agents in making up the net worth and expenditure statements and it all went in as against Gus and was highly prejudicial.

2. We contend that the evidence was insufficient as against Gus. Most of it as to counts 1 to 8, which involved Nick Papadakis and Gus, was hearsay. The only support in connection with any of it was found in the statements of Mattis, the informant, and who was an accomplice and the agent of the Government in what, we contend, was a campaign of entrapment. Gus was in the service from 1941 to 1945, and for two years was overseas. He did not and could not have taken part in any of the activities during those years concerning which the agents testified, and which testimony went into the making up of their net worth and expenditure statement by which they computed unreported income and unpaid taxes as against Nick. Gus returned home in 1946, and after that entered into the operation of one of the liquor stores with his brother. There is no evidence that he himself had any income, that he altered any books or records, or that he himself gained anything, or that he entered into any plan or scheme with his father. His only assets were a home valued at \$12,900.00 which he purchased by means of a Veterans' loan from the State of California and a \$5,300.00 gift from his father. He owned a 1949 automobile which he paid for by payments,

and household furniture. All of the records in connection with the liquor stores were kept in ordinary form in small ledgers, deposits were made in the bank of their business, and expenditures made by check, except small items under \$50.00. Invoices of all purchases were kept and were available for the agents to examine. We contend the evidence was insufficient as to him.

3(a) Mattis was an informer and notwithstanding he worked on the income tax returns of the Papadakis family from 1947 through 1952, for which he was paid, he addressed a letter to the Government in 1948, and in 1949 turned over to Government agent Vitello numerous papers and documents which he had used in the preparation of returns which he himself said were false. He continued to work with the Papadakis family for almost four years after he had first written the Government and for three years after he had been discussing the matter with Government agents and turning over papers to them. His conduct indicates that there was a plan of entrapment laid out and which he executed. The Court utterly failed to properly instruct the jury on the law of entrapment, notwithstanding our request to do so, amplified by proffered instructions on the law of entrapment. The only instruction the Court gave was on the general subject of the weight and credibility of witnesses.

(b) Mattis having himself testified that he prepared the returns, that all of the work sheets were in his handwriting, that he worked out the figures himself and then

reduced it to returns which were signed by the taxpayer, and in some instances actually filed by Mattis. He testified that he knew some of the returns were false when he filed them. The evidence conclusively proves that he was an accomplice. The jury should have been instructed upon the law of accomplice, but were not. The only instruction given that could possibly relate to the subject was the general instruction upon the credibility of witnesses.

(c) In view of the fact that the Court refused and neglected to instruct upon the subject of entrapment, utterly failed to instruct upon the law of accomplice, and then gave an instruction with reference to the defendants which pointed up to the jury that they should consider the hopes and fears of the defendants and his concern with the result of the prosecution, we think the instruction was error, to the great prejudice of the defendant and appellant, because the defendant was singled out for special consideration, whereas nothing was said about the informer and accomplice and the manner in which his testimony should be considered.

(d) We urge that in view of all that has been said in this case, the Court should have been extremely careful in instructing, especially as to the duty of jurors. The Court informed the jury that a verdict was expected, and while the Court said that if the juror had reached an opinion and after discussion with his fellow jurors, that he was wrong, then he should unhesitatingly change his opinion. Then the Court neglected to advise that we were entitled to the individual and independent opinion of each juror.

ARGUMENT.

I.

It Was Error to Permit the Evidence Against Nick Papadakis on the Net Worth and Expenditure Method and Other Matters to Be Used Against C. N. or Gus Papadakis. It Was Hearsay As to Him.

At the outset of the trial, the Government, through the prosecutor, informed the Court that the net worth and expenditure method would be used [Rep. Tr. p. 10].

Throughout the trial this was pursued by showing acquisition of real properties and assets, consisting of money, bonds and treasury notes, by the father, Nick Papadakis, over repeated objections of the appellant Gus Papadakis.

For instance, there was received in evidence the Exhibits Nos. 34, 74 and 75, to name a few, which are appended to this brief, which went to show large acquisitions of real property, large sums of cash and substantial expenditures by Nick Papadakis, without any foundation to show that Gus Papadakis had anything to do with the acquiring of these assets. In fact, much of it came while he was a youth, and some while he was actually away in the Service.

The objections appear [Rep. Tr. pp. 49 and 50]:

“Mr. Laven: At this time the Government offers 34 for identification as Exhibit 34 in evidence.

“Mr. Parsons: To which the defendant C. N. Papadakis, objects as being hearsay and no proper foundation having been laid to show that we had anything to do with the preparation or control of any of the information, books or records from which this

document was made or that it is binding upon us in any respect.

I might state that in connection with that there were numerous returns offered as to Nick and Katina Papadakis. I neglected to make the same objection as to them but they were hearsay as to this defendant and this document particularly is."

Then there was discussion at pages 50, 51 and 52 of the record, during the course of which it developed that some of this information had been accumulated during the time Gus Papadakis was in the Service, as testified by the agent himself [Rep. Tr. pp. 50-52]. It is true the Court reserved a ruling at that time, but subsequently the documents all went in evidence, and undoubtedly contributed much to the conviction of C. N. or Gus Papadakis on Counts 1 to 8, inclusive.

Let us take, for example, Government's Exhibit 75, which is attached to the brief in the appendix. When it was offered it was identified by the agent as containing items such as war bonds, treasury notes, accounts receivable, real properties owned, liabilities, etc. [Rep. Tr. p. 267]. The agent, Wilbur, discussed it with Nick Papadakis. It was offered and received over our objections [Rep. Tr. p. 270].

To further aggravate this situation, the agent was permitted to testify that on March 27, 1950, he and agent Vitello went to the LaSalle Hotel where they met Nick Papadakis and another son, Ernest Papadakis. Objection that it was hearsay was interposed by the appellant Gus Papadakis [Rep. Tr. p. 274] and promptly overruled. In the course of that discussion with Nick and Ernest Papadakis, the witness identified Exhibits 77, 77-A and 77-B. These were termed rental income summaries prepared by

the witness from the rental property income book kept by Ernest Papadakis, and which had been loaned to the agent by Ernest Papadakis for the purpose of preparing his summaries [Rep. Tr. pp. 275, 276]. The agent pointed out to Nick Papadakis that it appeared to him the book disclosed several months where no rentals had been shown, or which had been omitted. At this time they inquired of Nick Papadakis as to each discrepancy and asked him why the rental had not been shown, and the agent stated that Nick's reply was, "Generally speaking, in most cases he could not understand why no rental had been shown where my summary had indicated an omission" [Rep. Tr. p. 277]. We earnestly contend that this was highly inflammatory testimony, which could not be met by us, and which needs no citation by us to show that it was pure hearsay and prejudicial.

However, the law is plain with reference to conversations, documents and similar hearsay evidence. See *Corpus Juris Secundum*, Vol. 31, p. 919, also Cumulative Pocket Part, 1953, Vol. 31, p. 919. See also *Landstrom v. Thorpe*, 8 Cir., 189 F. 2d 46, 53; *Salem New Publishing Co. v. Caliga*, 1 Cir., 144 Fed. 965; *United States v. Hiss*, 2 Cir., 185 F. 2d 822; *Globe Indemnity Co. v. McAvoy Co.*, 41 F. 2d 122, 126.

There was next offered a document 77-B in evidence as a summary of the examination based upon the books and records showing rental income omitted from the books of Nick Papadakis. To this the defendant C. N. Papadakis objected as being hearsay, but the Court permitted the receipt of the document in evidence [Rep. Tr. pp. 285, 286]. Next there was further evidence with reference to omitted rentals, as contained in a summary marked 77

and 77-A, and a discussion was had with Nick Papadakis by the agents Wilbur and Vitello with reference to why there had been an omission of rentals. To this conversation the defendant C. N. Papadakis objected [Rep. Tr. pp. 287, 288]. The Court overruled the objection and permitted the testimony. During the course of this testimony Nick Papadakis stated that in later years the books had been kept by Ernest Papadakis, some entries had been made by himself, and some by his daughter [Rep. Tr. pp. 287, 288]. Obviously this testimony was highly inflammatory, and no foundation whatsoever to establish any connection whatever on the part of the defendant Gus. In fact, the books were kept by his brother Ernest, and his sister, as well as by his father.

The foregoing testimony was accentuated by the following testimony, which can be found on pages 291 of the Reporter's Transcript, through page 297. Summarized, the agent Wilbur was permitted to relate a conversation with Nick and Ernest Papadakis (in the absence of Gus) with reference to books at the LaSalle Hotel, and the agent stated that he informed Nick that after running tapes from the books which he had taken to his office to audit, he found differences in the book covering the same period. That he told Nick Papadakis that he could not understand why the entries in the books for 1946 and 1947 and 1948 were not the same as when he borrowed the books the first time in August. Nick then replied, "he did not understand." The agent then stated he found items which were new items, and which had "previously not appeared." The agent then pointed out these items in the books by using a blue arrow to indicate items in the books which appeared there the second time he examined

them, but were not present in the books the first time he examined them.

The following testimony is particularly aggravating, and is quoted verbatim from the record [Rep. Tr. pp. 295-297]:

“Q. All right then, what was the conversation and what did you find by going through the rental books concerning the omitted items? A. I told Mr. Nick Papadakis that it seemed very peculiar that these items had been added at the top of the page or the bottom of the page or in the middle of the page where there was a gap between two months and asked him if he had any explanation as to why these entries were in the locations they were, and his answer—his only explanation to me was that this was the book I had been handed back in August 1949 and that he simply couldn’t understand what was being talked about.

Q. Did you point out to him on the sheets that you had where there were some additions in his own handwriting? A. I, to the best of my recollection, I believe I did point out one or two items.

Q. Will you look at the photostatic copies, part of Exhibit 79, and see if you can find those sheets? A. (No answer.)

Q. May I ask you this. 79— does that include all the sheets you had at that time or just part of them? A. I don’t know without checking these in detail whether these are all the rental receipt ledger sheets in the original book.

Q. Well, let us now get to the question I asked you or we are concerned about, any additions in the handwriting of Nick Papadakis. A. Mr. Laven, without a great deal of time to go through here I

don't believe I can tell you that. Do you desire me to take the time?

Q. Not at this moment. We probably can do it at the recess. Do you recall any other conversation at that time concerning this Exhibit 79 for identification? A. Yes. I asked Mr. Nick Papadakis if this was the original set of books that had been maintained to record the rentals as they came in month by month. He replied that it was. I asked him why were all the entries in this book apparently made by the same fountain pen and he replied that it looked all right to him.

I asked him why these books had not been totaled and to the best of my recollection he said that they certainly must have been totaled at some time. And I stated to him positively that I believed that these were not the original books, but Mr. Papadakis stated that I must be mistaken because they were the books.

Q. Anything else said at that time concerning Exhibit 79 and its component parts? A. Yes. I stated to Mr. Nick Papadakis that it appeared to me that most of the entries which I had told him I believed were alterations, most of those entries were in the writing of Ernest Papadakis.

Q. What did he say about that? A. To the best of my recollection he agreed but stated that this was the original book."

The entire record is replete with the admission of evidence against Gus Papadakis with which he had no concern, and this evidence was admitted largely in connection with testimony by the Government agents relating to their conclusions as indicated by the summaries which they prepared, based upon their inquiry into the books and records and bank records, bank deposits, and numerous

other items. This, we contend, is the vice of this type of evidence, for it permits, and did in this case, the agents to give opinions and to offer in evidence written summaries which were based upon matters with which this appellant had no concern. He was in no position to resist them, no position to meet them. It was hearsay and highly prejudicial.

The law has ever been in connection with the basic principles of criminal law that the burden rests upon the Government of proving the defendant guilty. It is not for the defendant to prove his innocence, but the gradual whittling away of the rights of defendants has almost brought a reversal of the time honored principle that a defendant was presumed to be innocent until the contrary was proved beyond all reasonable doubt. One need but read the recent case of *Bell v. U. S.* (1950), (4th Cir. 185 F. 2d 302), to be convinced how the presumption of innocence has been eroded by judicial decision. It recognizes the time honored rule that the burden of proof does not shift, but at the very time this is being said, violence is being done to the rule itself. We think the recent decision of the *United States of America v. Michael Caserta*, 3rd Cir., decided November 21, 1952 (199 F. 2d 905), is in point, and shows the danger to which a defendant may be subjected by failing to recognize and apply these basic principles of criminal law, especially in tax cases, which should be no different than any other form of prosecution.

The law is plain that there must be proof of taxes due and unpaid to support a conviction, regardless of what method may be used by the Government to establish such a situation. (*United States v. Schenck* (2nd Cir.), 126

F. 2d 702; *Paschen v. United States* (7th Cir.), 70 F. 2d 491; *Rose v. United States*, 128 F. 2d 622). Therefore, before a conviction of the appellant here under the facts in this case can stand, it must appear that there were taxes due and unpaid; that he willingly aided his father in the preparation of false returns. The evidence as given by the Government agents on the net worth and expenditure method, as shown by the oral testimony and by the exhibits, utterly fails to connect the appellant C. N. Papadakis with any fraudulent transaction related to Counts 1 to 8.

C. N. or Gus Papadakis can only be convicted upon the theory that he was an abettor. We say the evidence is utterly lacking as to this, and in practically all instances the evidence offered under this theory was hearsay as to Gus Papadakis. We think the remarks of Learned Hand in *United States v. DiRe*, 2nd Cir., 159 F. 2d 818, 819, are pertinent:

“We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principles in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals in the sense that he has a stake in the success of the venture.”

I think we have a right to ask here, what stake did Gus Papadakis have? What did he receive in connection with Counts 1 to 8 where he is charged with having actually aided his father? The most that can be said is that from the information at hand, he assisted in the preparation of the return.

II.

**The Evidence Was Insufficient Against the Appellant
C. N. (Gus) Papadakis.**

We have already summarized the evidence which was admitted against Gus Papadakis, including that which we contend was both hearsay and highly prejudicial, and will not here repeat it. Where is the evidence that Gus aided his father with criminal intent? The only support is to be found in the statements of Mattis, the informer and accomplice, as heretofore summarized. We contend it was not sufficient.

Gus was in the Service from 1941 to 1945, and in 1944 and 1945 was overseas [Rep. Tr. p. 587]. The rest of the time he was only in port every month or two, and was not in close touch with the business [Rep. Tr. p. 588]. Before he went in the Service, Gus worked in the liquor store [Rep. Tr. p. 589], and he had an understanding with his father that when he came back from the Service, the store would be his [Rep. Tr. p. 590]. When he returned his father was operating the store. He testified that he knew something of his father's properties before he went away, but that his father acquired some while he was in the Service. That after his return, he entered into a partnership with his brother George to operate the liquor stores [Rep. Tr. p. 592]. That they were to pay the father for the inventory. That the only property he had was the interest in the stores, his home that he bought for \$12,900.00, with the help of \$5,300.00 given to him by his father, and the aid of a Veterans' loan from the State of California. In addition he had a 1949 DeSoto automobile which he purchased on time, and household furniture. These were his assets. [Rep. Tr. pp. 597, 598].

The Activities of Gus.

Gus kept records concerning the stores, deposited the money in the bank [Govt. Ex. 67] [Rep. Tr. pp. 599, 600]. The entries in the store books were made at the liquor stores by the clerks [Rep. Tr. p. 604], were picked up and summaries made, and the main books were kept in the central store on Pacific Street, where an office and warehouse was maintained. No records were ever destroyed or removed [Rep. Tr. p. 605]; all bills were kept to show purchases [Rep. Tr. p. 607]; that in the preparation of income tax returns, he gathered information and took it either to Hoffman or Mattis, the accountants [Rep. Tr. p. 612]; that he never told Mattis to take off \$10,000.00 or any sum from inventory or after purchases. That he knew all of the distributors from whom they purchased liquor and supplies, kept records of sale and were supervised by the Board of Equalization of the State of California [Rep. Tr. pp. 612, 613]. That he never kept any records for his father in 1946, 1947, 1948 or 1949, but that in 1950 he aided his father in the keeping of the hotel books [Rep. Tr. p. 629]; that he kept them as correctly as he could.

Evidence Given by Martha O'Sullivan, Defendants' Accountant.

Martha O'Sullivan testified she was a certified public accountant; had practiced the profession of accounting since 1934; was a member of the American Institute of Accountants and of the California Society of Public Accountants; that she was Chairman of the Practice and Procedure Committee of the California Society of Public Accountants; that she was a member of the firm of Gabrielson, O'Sullivan & Poulson, certified public account-

ants; that they did a varied business and employed eleven accountants in addition to the three partners [Rep. Tr. pp. 915-917]; that they did work for numerous corporations and municipalities, including the County of Los Angeles, County of San Diego, and the Cities of Huntington Beach and South Gate. That her firm was employed in connection with the Papadakis matter under the direction of Attorney Murray Chotiner; that she was informed there was a fraud investigation pending, and she was instructed to make an audit of the Papadakis accounts and records, and specifically was instructed to give all benefit of doubt to the Government, and to then prepare a report to be used in connection with the possible compromise of the differences between the Government and Papadakis [Rep. Tr. pp. 918-921]. Her office then commenced an investigation, examining numerous records, and commenced the building of a general ledger, using bank accounts, which bank accounts were in the possession of the Government [Rep. Tr. pp. 924-926]. They checked their real properties, and found that all properties were traceable to bank deposits, notwithstanding agent Vitello had told her differently [Rep. Tr. pp. 926, 927]. After her investigation she prepared Government's Exhibit 34, attached to the Appendix herewith, which was an increase in net worth statement, and subsequently the tentative amended returns were prepared by her, Government's Exhibit 35.

That she attended the trial of this matter, heard the testimony, with the exception of a small part of the testimony; that she had examined the exhibits, including the original returns of Nick and Katina Papadakis for 1945 through 1949, which were marked Government Exhibits 15 to 24, inclusive. That she had also examined

the increase in net worth statement prepared by Mr. Vitello, Government's Exhibit 75, a copy of which is attached hereto in the Appendix. That she had also examined Government's Exhibit 85, which was a work sheet, where the Government had attempted to compute income from 1917 to 1944; she had also examined Government's Exhibit 88 [Rep. Tr. pp. 937, 938], Government's Exhibit 88 being entitled a "Computation of Unreported Income" for the period 1945 through 1949; also Government's Exhibit 89, being a "Net Worth Statement" for Nick and Katina Papadakis. Also she had examined Government's Exhibit 90, being a schedule of the difference between the net income reported on the original returns and the corrected net income, net worth [Rep. Tr. p. 939], and after all of this, she had prepared summaries of her analysis in the increase and net worth and taxable income and the taxes due, if any, from Nick and Katina Papadakis. That she had prepared a schedule of assets, liabilities and net worth as of December 31, 1944 to December 31, 1949, relating to Nick and Katina Papadakis. This was received in evidence, defendants' Exhibit N-D, a copy of which is attached hereto in the Appendix [Rep. Tr. pp. 941-943]. In connection with the analysis she prepared a document labeled "Analysis of Change in Net Worth" for the years of 1944 to 1949, which was received in evidence as Defendants' Exhibit N-E, a copy of which is attached hereto in the Appendix [Rep. Tr. pp. 943, 944]. Next she made a recomputation and reconciliation for the unreported income for the years

1945 to 1949, inclusive, of Nick and Katina Papadakis, which was received in evidence as Defendants' Exhibit N-F, and is attached hereto in the Appendix [Rep. Tr. pp. 944, 945]. Next she prepared a document called "Taxable Income Computation for the Years 1945 to 1949," which was a work sheet based on the records and exhibits in the case. This was received in evidence as Defendants' Exhibit N-G, a copy of which is attached hereto in the Appendix [Rep. Tr. pp. 945, 946]. Next she prepared a document called "A Summary of the Computation of Taxes" which, in her opinion, were due from Nick Papadakis based on her work sheets and her investigation. This was received in evidence as Defendants' Exhibit N-H, and is attached hereto in the Appendix [Rep. Tr. pp. 945, 946].

The witness then testified that there were changes reflected in the net worth statement, Defendants' Exhibit N-D, as compared with Government's Exhibit 75 (the document prepared by Government agent Vitello); that as between this and the original schedule of net worth, the major change was the change of \$35,100.00, relating to the acquisition of a building at 1227 South Pacific, it having been stipulated by the Government as being an error in Government's Exhibit 75 [Rep. Tr. p. 947]; that, in her opinion, that when you used the difference in net worth method of computing the taxable income, if it were left in 1945, when it was not purchased in that year, it would look like there was \$35,100 taxable income in that year, but that is not correct. The witness stated that with reference to Defendants' Exhibit N-F, which related to

a computation of unreported income for the years 1945 to 1949, and as compared with Government Exhibit 88 for 1945, they show unreported income of \$20,822.94, which is the total for Nick and Katina Papadakis, and she shows only \$2,548.34, one-half of which is for Nick Papadakis, or \$1,274.17; that, in her opinion, this distortion took place by reason of an error in Government's Exhibit 88, where, in adjusting capital loss, they actually added the capital loss back one and one-half times to income, rather than giving a deduction for half of it. The balance of the adjustment was made up by net income of C. N. and George Papadakis which was remaining in the commercial bank account, leaving unreported income of \$2,548.34, whereas the Government contended it was \$20,822.94 [Rep. Tr. pp. 952-954]. The accountant had examined the returns for 1946 and records relating thereto, but no indictment was returned as to that year. With reference to the year 1947, the Government claimed an unreported income for Nick and Katina Papadakis of \$42,949.12, and she adjusted the same by showing that the net income of Ernest Papadakis remained in the commercial bank account, but after their analysis the unreported income was only \$10,734.21, as compared with \$42,949.12 [Rep. Tr. pp. 956, 957]. That the Government claimed \$42,395.28 for the year 1948 as unreported income, whereas after her analysis it was \$7,844.70 as the half for Nick Papadakis. There was an increase from their previous statement of \$7,000.00 because of a loan in 1948 which had originally been shown in 1949. That

was added back, but after taking into account the money of Ernest Papadakis in the account, money applied on the indebtedness due from the boys from their purchase of the stores, and after adjusting this, you have unreported income of \$15,689.39 for Nick and Katina Papadakis. For the year 1949, instead of \$34,440.29 which the Government claims as unreported income, she showed an overstatement of income by Nick Papadakis of \$71.51. They reduced the Government's computation of unreported income by the net income of Ernest Papadakis, and also \$7,150.00 which was an amount paid by the liquor stores and used as a deposit on a building which Nick Papadakis credited against the \$25,000.00 the boys owed him [Rep. Tr. pp. 957, 958]. They also reduced it by the payment of the bank loan of \$7,100.00, which went direct into the building. After this reconciliation and adjustment, there was an over-reporting of income of \$143.02. The Exhibit N-F, the witness testified, she computed to be the taxable income chargeable, giving no benefit of doubt of doubtful items. The witness was then asked concerning taxes paid, estimates of what were due as computed by the Government and herself, and also the charge as shown in the Indictment. For instance, in 1947, on the original return Nick Papadakis paid \$876.40. The Indictment charged he should have paid \$9,375.98, the Government witnesses said it was \$10,086.42, the witness O'Sullivan said it should have been \$2,664.99. For 1948, Nick Papadakis paid \$1,041.00; the Government charged in the Indictment \$11,817.94; on the tentative return she reduced it to

\$3,796.46. In 1949, Nick Papadakis paid \$1,820.45; the Indictment charged \$2,750.96; in court the Government witnesses contended he owed \$9,226.99; the witness' tentative return showed \$2,731.58. The witness stated that, in her opinion, in view of all the facts in this case, the minimum is closer to what would be the true status of the case [Rep. Tr. pp. 963-965].

In the light of all of this, we earnestly contend that the evidence, insofar as Gus Papadakis is concerned, is woefully lacking, and the convictions should not be sustained.

May we respectfully call this Court's attention to the fact that the trial court himself expressed doubt as to the evidence in support of some of the counts, in the following language [Rep. Tr. p. 1036]:

"The Court: Well, the evidence as to some of the counts seems to me to be rather weak. There may be enough to take it to the jury. I will deny the motion."

It is especially important in view of the fact that Gus Papadakis is charged jointly with Nick Papadakis in Counts 1 to 8, inclusive, to note that Gus Papadakis could only have been convicted upon the theory that he was an aider and abettor. There must be some evidence to show that he promoted the venture himself, either made it his own, or had an interest in the outcome. (*United States v. Falcone*, 311 U. S. 204, 209, 109 F. 2d 579; also *Morie v. United States*, 127 F. 2d 827; also *Yenkichi Ito v. United States* (C. C. A. 9), 64 F. 2d 73, 75.)

III.

The Court Erred in Failing to Properly Instruct the Jury on the Subject of Entrapment, Accomplice, and the Duty of Each Individual Juror.

(A) The informer, Mattis, testified concerning conversations with Gus Papadakis and revenue agents, as stated in our summary of the evidence, to which we respectfully direct the Court's attention. Briefly, he had numerous discussions with Gus respecting inventory, purchases, etc., to the general effect that net income be reduced [Rep. Tr. pp. 138, 141, 143, 144, 147, 148, 153, 154, 159, 160, 161, 163, 173, 179].

Mattis testified he had prepared the returns for the Papadakis family for all of the years involved, and even through 1952, for which work he was paid by the Papadakis family a reasonable fee [Rep. Tr. pp. 344-346]; that he had consulted Government agents and had written a letter in 1948, and knew he might be paid on any recovery effected by the Government [Rep. Tr. pp. 210, 211]; that in 1949 he turned over his work sheets to agent Vitello [Rep. Tr. p. 346]; that he prepared and filed returns for Papadakis that he knew to be false [Rep. Tr. pp. 185, 186].

By reason of the facts in this case, the jury might well have believed that Gus Papadakis was being entrapped. This was brought to the Court's attention upon more than one occasion [Rep. Tr. pp. 1074, 1075], and by proffered instructions, as follows [Clk. Tr. pp. 56, 57]:

“DEFENDANT C. N. PAPADAKIS’ REQUESTED INSTRUCTION No.

You are instructed that the first duty of officers of the law is to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Therefore, when the criminal design originates, not with the accused, but is conceived in the minds of the Government or persons working in conjunction with Government officers and the accused is, by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor, and, therefore, if you find from the evidence in this case that the accused in this case were entrapped, you must acquit the accused.

Butts v. United States, 273 Fed. 35, 38;

Newman v. United States, 299 Fed. 128, 131.”

The next requested instruction [Clk. Tr. p. 57] is as follows:

“In arriving at your verdict, you have a duty to take into consideration the motives and statements of the prosecution’s witnesses, which include the officers and anyone working in conjunction with the officers.”

The next proffered instruction [Clk. Tr. p. 57] is as follows:

“If you believe that the defendants were entrapped by persons or a person working in conjunction with agents of the Government, it is immaterial if they thus committed some offense. If you believe the defendants were entrapped, it is your duty to acquit them.”

The next proffered instruction [Clk. Tr. p. 58] is as follows:

“You are instructed that if the accused in this case were entrapped through the efforts or design of Leonard Mattis, then you must acquit the accused.”

These instructions were all refused by the Court, and the only instruction given by the Court on the interest of witnesses or how to judge the testimony of witnesses, was the general instruction upon the credibility of witnesses [Rep. Tr. p. 1066], as follows:

“You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by evidence affecting his character for truth, honesty and integrity or his motives or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to Government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon the credibility. If a witness is shown knowingly to have testified falsely on the

trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness's testimony."

(B) Next we respectfully direct the Court's attention to this fact, which we think is all important. The Court failed to instruct upon the law of entrapment, and we contend that the facts were such as related even by Mattis, the Government agents, and Gus Papadakis, that this should have gone to the jury with proper instructions, but the failure so to do is aggravated by this situation, and that is that Mattis himself testified, as heretofore pointed out, concerning conversations with Gus Papadakis in which Mattis claims that Gus told him he wanted to make certain changes in inventory, purchases, expenses, etc., in order to reduce the income tax, and that he, Mattis, knowingly filed false returns. The evidence further showed that these returns were all prepared by Mattis, and all of his notes in his own handwriting were offered in evidence. This case went to the jury with absolutely no instruction on the subject of accomplice. Surely, Mattis was an accomplice, and the usual instruction that his testimony "should have been viewed with caution" should have been given. It was the Court's duty so to do, but the only instruction given was the instruction on the credibility of witnesses just hereinabove set forth in subparagraph (A).

(C) We next respectfully direct the Court's attention to the instruction given by the Court with reference to how the testimony of the defendants should be considered.

This is especially important in view of the failure of the Court to properly instruct as to entrapment and accomplice. The instruction is as follows [Rep. Tr. p. 1067]:

“The defendants have offered themselves as witnesses and have testified in the case. Having done so, you are to estimate and determine their credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendants may have in the case, their hopes and their fears, and what they have to gain or lose as a result of your verdict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses, you are authorized to draw such inferences from the facts and circumstances which you find may have been proved as seem justified in the light of your experience as reasonable men and women.”

This instruction is particularly vicious, as it points up that special consideration should be given to the interest, the hopes and fears of the defendants. The rule is, as we understand it, that the testimony of all witnesses should be measured by the same rule. There is no different rule which applies to a defendant. Here we were confronted with an informer, an accomplice. No instructions were given as to him, and in this instance the Court points out that they might pay particular attention to the hopes and fears of the defendants. This was highly prejudicial, we earnestly contend.

(D) We next point out the instruction given by the Court [Rep. Tr. p. 1068], and particularly a portion of the instruction, as follows:

“Jurors are expected to agree upon a verdict where they can conscientiously do so, you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced it is erroneous.”

This is the only instruction which even remotely suggests to the jury that the defendants and the Government alike were entitled to the individual opinion of each juror. It was woefully lacking in those elements which point out to the juror that he might render his individual opinion, which we understand to be the law. We proffered an appropriate instruction upon the subject which is as follows [Clk. Tr. p. 49]:

“You are instructed that the defendant is entitled to the individual and independent verdict of each and every member of the jury, and the evidence should be such, in order to warrant a conviction, that he is guilty of the crime charged beyond a reasonable doubt, and unless the evidence does so establish such fact in the mind of each and every juror, then such juror should vote to acquit the defendant.”

The Law Applicable.

With reference to entrapment, the authority upon the subject is *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413; *Butts v. United States*, 273 Fed. 35, 38; *Newman v. United States*, 299 Fed. 128, 131.

We respectfully direct the Court's attention to the recent case of this Court, tried before the same District Judge who tried this case, namely, *Lufty v. United States*,

198 F. 2d 760, where the conviction was reversed upon the ground of entrapment.

We are not mindful of the fact that it has been said that merely because officers and agents of the Government afford opportunities for the commission of the offense does not make it entrapment, the deceit must originate with the official or agent; however, there were two sets of facts in this case, and it was for the jury to determine the same under proper instructions from the Court.

With reference to accomplice, we are aware of the fact that the Court has wide discretion, and although the testimony of an accomplice will support a conviction. (*Caminetti v. United States*, 242 U. S. 470, 495, 61 L. Ed. 442). we do not believe it to be the law that a conviction may stand where the evidence plainly showed that the witness is an accomplice and the Court has failed to instruct. Fairly recent cases on accomplice: *Stillman v. United States*, 177 F. 2d 607, 616. In the *Stillman* case just cited, the Court gave a proper instruction to the effect that the testimony of the witnesses should be given "close scrutiny and treated with caution." See also *Brickey v. United States*, 123 F. 2d 341, 345.

Conclusion.

The District Court erred in the particulars that we have pointed out, and for the reasons set forth, we respectfully pray that the judgment and order denying the motion for new trial be reversed and set aside, to the end that justice may be done.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Appellant C. N. (Gus) Papadakis.

APPENDIX
(Exhibits)

NICK AND CATINA (KATINA; CATENA) PAPADAKIS

STATEMENT OF ASSETS AND LIABILITIES
December 31, 1941 to 1949 Inclusive

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A S S E T S

	December 31, 1941	December 31, 1942	December 31, 1943	December 31, 1944	December 31, 1945	December 31, 1946	December 31, 1947	December 31, 1948	December 31, 1949
Cash in Bank - Savings Account	\$ 5,643.33	\$ 5,384.79	\$ 26,825.70	\$ 14,459.23	\$ 575.75	\$ 20,631.25	\$ 6,120.34	\$ 786.77	\$ 794.65
Cash in Bank - Commercial Account	2,359.18	7,558.64	9,718.96	20,260.81	17,015.70	14,907.77	3,807.12	5,238.63	3,213.04
United States War Bonds		150.00	3,150.00	14,400.00	58.25	58.25			
United States Treasury Notes and Series "G" Bonds					14,500.00	14,500.00	64,500.00	64,500.00	64,500.00
Receivable from Sons and Others			750.00			26,050.00	17,550.00	12,150.00	5,000.00
Trust Deeds Receivable - Bardsen and Knudsen		6,356.37							
- Borger and Borreson	2,811.13	1,817.37							
- Harry and Helen Hirsch							14,949.99		
- Robert Ivon			2,200.00						

LAND AND BUILDINGS

Date Acquired	Description								
1916	Building	536-540 12th Street	9,500.00	9,500.00	9,500.00	9,500.00			
1922	Home	1405 S. Meyeler Street	23,500.00	23,500.00	23,500.00	23,500.00	23,500.00	23,500.00	23,500.00
1923	La Salle Hotel	255 W. 7th Street	61,000.00	61,000.00	61,000.00	61,000.00	61,000.00	61,000.00	61,000.00
1931	Garage	273 W. 7th Street	11,000.00						
1932	Frame	1022 14th Street	3,000.00	3,000.00	3,000.00				
1932	Frame	1325-31 - 13th Street	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
1934	Frame	1557 W. 7th Street	3,500.00	3,500.00					
1935	Frame	1561 W. 7th Street	3,500.00	3,500.00					
1935	Lot and Cabin	Lake Arrowhead	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00
1938	Mission Hotel	255 W. 7th Street	28,200.00	28,200.00	28,200.00	28,200.00	28,200.00	28,200.00	28,200.00
1939	Store	2200-2204 S. Pacific Blvd.	16,500.00	16,500.00	16,500.00	16,500.00	16,500.00	16,500.00	16,500.00
1943	Frame	477-485 W. 22nd Street			17,272.41	17,272.41	17,272.41	17,272.41	17,272.41
1943	Brick	331-335 W. 6th Street			22,000.00	22,000.00	22,000.00	22,000.00	22,000.00
1944	Apartment	536-542 W. 23rd Street			14,000.00	14,000.00	14,000.00	14,000.00	14,000.00
1944	Store	381-385 W. 6th Street			30,000.00	30,000.00	30,000.00	30,000.00	30,000.00
1944	Store	1221-1227 S. Pacific Blvd.			35,100.00	35,100.00	35,100.00	35,100.00	35,100.00
1945	Store	258-276 W. 6th Street				68,250.00	68,250.00	68,250.00	68,250.00
1947-8	Store	1039 Wilmington-San Pedro Road					8,500.00	30,936.58	34,193.85
1948	Building	301-303 W. 6th Street						39,965.00	39,965.00
1949	Building	19th and Santa Fe							16,600.64
1949	Building	1908 Santa Fe							17,118.76
Various Automobiles			1,100.00	1,100.00	1,100.00	2,139.77	2,139.77	4,154.60	4,154.60
Various Furniture for Hotel				6,000.00	6,000.00	6,000.00	6,000.00	6,000.00	9,135.11
Liquor Inventory at 2200 S. Pacific			2,969.72	2,915.80	3,896.09	6,692.72	7,268.34		
Liquor Inventory at 267 W. 7th Street			4,103.50	4,573.55	3,491.72	5,562.41	5,662.31		

Total Assets

\$189,886.86 \$195,756.52 \$249,304.88 \$337,787.35 \$380,242.53 \$411,309.45 \$452,604.46 \$490,753.99 \$521,698.06

LIABILITIES

NICK AND CATINA (KATINA; CATINA) PAPADAKISANALYSIS OF CHANGES IN NET WORTH
Years 1942 to 1949 Inclusive

	1942	1943	1944	1945	1946	1947	1948	1949
NET WORTH AT BEGINNING OF YEAR	④ \$166,048.69	\$185,870.73	\$230,254.23	\$294,623.44	\$320,317.10	\$362,256.21	\$375,335.65	\$382,724.56
INCOME DURING YEAR:								
Net Income from Hotel and Rental Properties	\$ 11,177.74	\$ 26,526.95	\$ 45,166.60	\$ 39,683.89	\$ 56,943.57	\$ 20,361.25	\$ 23,364.74	\$ 25,041.92
Interest Income	55.04	212.00	133.53	79.60	40.50	972.19	1,731.44	1,620.38
Gain or Loss on Sale of Property	3,550.00	500.00		1,513.08				
Unaccounted for Increase in Cash	17,185.72	31,625.91	43,566.18	5,227.13	4,836.17	4,854.33	9,148.68	1,333.22
Total Income	\$ 24,868.50	\$ 57,864.86	\$ 88,866.31	\$ 43,477.54	\$ 61,820.24	\$ 26,187.77	\$ 34,244.86	\$ 25,329.08
Less Deductions	1,330.54	2,675.80	1,000.00	1,000.00	1,699.44	1,000.00	1,000.00	1,067.50
Net Income Before Federal Income Tax	① \$ 23,537.96	\$ 55,189.06	\$ 87,866.31	\$ 42,477.54	\$ 60,120.80	\$ 25,187.77	\$ 33,244.86	\$ 24,261.58
Less Federal Income Tax Paid	115.92	3,151.56	9,100.68	13,183.88	10,912.00	8,506.98	4,247.20	2,000.82
Net Income After Federal Income Tax	\$ 23,422.04	\$ 52,037.50	\$ 78,765.63	\$ 29,293.66	\$ 49,208.80	\$ 16,680.79	\$ 28,997.66	\$ 22,260.76
Less Personal Living Expenses, Gifts, Etc.	3,600.00	7,654.00	14,396.42	3,600.00	7,269.69	3,601.35	21,608.75	4,750.00
Increase in Net Worth During Year	③ \$ 19,822.04	\$ 44,383.50	\$ 64,369.21	\$ 25,693.66	\$ 41,939.11	\$ 13,079.44	\$ 7,388.91	\$ 17,510.76
NET WORTH AT END OF YEAR	⑤ \$185,870.73	\$230,254.23	\$294,623.44	\$320,317.10	\$362,256.21	\$375,335.65	\$382,724.56	\$400,235.32
RECONCILIATION TO AMENDED TAX RETURNS:								
Net Income Per Tax Returns:								
Nick Papadakis	② \$ 10,673.98	\$ 26,054.53	\$ 41,758.16	\$ 18,516.54	\$ 26,742.40	\$ 10,934.89	\$ 14,763.60	\$ 12,481.04
Catina Papadakis	③ 10,673.98	26,054.53	41,758.15	18,516.54	26,742.40	10,934.88	14,763.60	12,481.04
Total	\$ 21,347.96	\$ 52,109.06	\$ 83,516.31	\$ 37,033.08	\$ 53,484.80	\$ 21,869.77	\$ 29,527.20	\$ 24,962.08
Add: 1/2 of Long Term Capital Gain		290.00						
Depreciation, Not Deducted Above,								
Deducted on Return	3,390.00	3,870.00	4,350.00	6,201.00	6,636.00	3,318.00	3,717.66	4,231.54
Less: Prior Depreciation on Assets Sold	\$ 24,737.96	\$ 56,269.06	\$ 87,866.31	\$ 43,234.08	\$ 60,120.80	\$ 25,187.77	\$ 33,244.86	\$ 29,193.62
1/2 of Long Term Capital Loss	1,200.00	1,080.00		756.54				
Unaccounted for Decrease in Cash								
Not Deducted on Return, Deducted Above								1,333.22
Accounted for Expenses in Excess of								
Checks Drawn, Not Deducted on Returns,								3,598.82
Deducted Above								
Net Income Before Federal Income Tax								
As Above	⑥ \$ 23,537.96	\$ 55,189.06	\$ 87,866.31	\$ 42,477.54	\$ 60,120.80	\$ 25,187.77	\$ 33,244.86	\$ 24,261.58

NICK AND KATINA (KATINA) PAPADAKIS

STATEMENT OF APPLICATION OF FUNDS Years 1942-1949 Inclusive

FUNDS WERE DERIVED FROM:

Net Income Before Federal Income Tax
(Per Amended Returns)

Decrease in Cash Balances

Collections on Receivables from Sons and Others

Collections on Trust Deeds Receivable

Decrease in Inventories

Bank Loans

Amounts Due to C. N. and George Papadakis

Amounts Due to Ernest Papadakis

Sale of Assets:

War Bonds

Garage - 273 W. 7th Street (Cost)

Inventories (Estimated Cost)

House - 1557 W. 7th Street (Cost)

Building - 536-540 12th Street (Cost)

Total Funds Derived

	1942	1943	1944	1945	1946	1947	1948	1949
Net Income Before Federal Income Tax (Per Amended Returns)	\$ 23,537.96	\$ 55,189.06	\$ 87,866.31	\$ 42,477.54	\$ 60,120.80	\$ 25,187.77	\$ 33,244.86	\$ 24,261.58
Decrease in Cash Balances			1,824.62	17,128.59		25,611.56	3,902.06	2,017.71
Collections on Receivables from Sons and Others			750.00			8,500.00	5,400.00	7,150.00
Collections on Trust Deeds Receivable	1,637.39	8,173.74	2,200.00			50.01	14,949.99	
Decrease in Inventories		101.54						
Bank Loans			13,000.00	14,800.00		4,000.00	19,000.00	9,000.00
Amounts Due to C. N. and George Papadakis	9,885.79	9,164.86	11,113.26	16,761.52	2,127.81			
Amounts Due to Ernest Papadakis						24,215.57	27,760.62	20,433.31
Sale of Assets:								
War Bonds				14,341.75		58.25		
Garage - 273 W. 7th Street (Cost)	11,000.00							
Inventories (Estimated Cost)					25,000.00			
House - 1557 W. 7th Street (Cost)		3,500.00						
Building - 536-540 12th Street (Cost)				9,500.00				
Total Funds Derived	\$ 46,061.14	\$ 76,129.20	\$ 116,754.19	\$ 115,009.40	\$ 87,248.61	\$ 87,623.16	\$ 104,257.53	\$ 62,862.60

FUNDS WERE APPLIED TO:

Purchase of Properties:

War Bonds

United States Treasury Notes and Series "B" Bonds

Buildings and Land:

477-485 W. 22nd Street

331-335 W. 6th Street

536-542 W. 23rd Street

381-385 W. 6th Street

1221-1227 S. Pacific

258-276 W. 6th Street

1039 Wilmington-San-Pedro Road

301-303 W. 6th Street

19th and Santa Fe

1908 Santa Fe

Automobiles

Furniture for Hotel

Payment of Real Estate Loan

Payment of Bank Loans

Federal Income Tax Paid

Personal Living Expenses (Including Gifts of Money)

Increase Cash Balances

Increase in Inventories

Increase in Receivables

Loans Granted - Trust Deeds

War Bonds	\$ 190.00	\$ 3,000.00	\$ 11,250.00					
United States Treasury Notes and Series "B" Bonds				\$ 14,500.00		\$ 50,000.00		
Buildings and Land:								
477-485 W. 22nd Street		17,272.41						
331-335 W. 6th Street		22,000.00						
536-542 W. 23rd Street			14,000.00					
381-385 W. 6th Street			30,000.00					
1221-1227 S. Pacific			35,100.00					
258-276 W. 6th Street				68,250.00				
1039 Wilmington-San-Pedro Road						8,500.00	\$ 22,436.58	\$ 3,257.27
301-303 W. 6th Street							39,965.00	
19th and Santa Fe								16,600.64
1908 Santa Fe								17,118.76
Automobiles			1,039.77			2,014.83		
Furniture for Hotel	6,000.00							3,135.11
Payment of Real Estate Loan	20,838.17							
Payment of Bank Loans	3,000.00			14,800.00	\$ 13,000.00		16,000.00	16,000.00
Federal Income Tax Paid	115.92	3,151.56	9,100.68	13,183.88	10,912.00	8,506.98	4,247.20	2,000.82
Personal Living Expenses (Including Gifts of Money)	3,600.00	4,154.00	11,396.42	3,600.00	7,269.69	3,601.35	21,608.75	4,750.00
Increase Cash Balances	4,940.92	23,601.23						
Increase in Inventories	416.13		4,867.32	675.52	12,069.35			
Increase in Receivables	7,000.00	2,950.00			26,050.00			
Loans Granted - Trust Deeds						15,000.00		

Case No. 27,730 - 90
vs. Papadakis
EXHIBIT 34
Date JUL 23 1952 No. 34 IDENTIFICATION
Date JUL 30 1952 No. 34 IN EVIDENCE
Clerk, U. S. District Court, Sou. Dist. of Calif.
Deputy Clerk

Nick and Catena Papadakis
and Anchor Liquors - Currency Deposit Excerpts

<u>Year</u>	<u>Total Deposits</u>	<u>Currency</u>	<u>Coin</u>	<u>Checks</u>	<u>Number of Checks</u>	<u>Remarks</u>
						<u>Savings Account #20590 @ Sec. 1st Bk. - San Pedro</u>
1942	\$ 55.04	- 0 -	- 0 -	\$ 55.04	2	- 0 -
1943	52,504.91	2,142.00	132.00	50,230.91	60	Largest currency dep., \$847.00
1944	30,133.53	- 0 -	- 0 -	30,133.53	5	- 0 -
1945	36,066.52	- 0 -	- 0 -	36,066.52	5	- 0 -
1946	20,055.50	- 0 -	- 0 -	20,055.50	29	- 0 -
1947	25,098.56	7,500.00	- 0 -	17,598.56	7	(6-2-47 \$2,500. (6-9 5,000.
1948	15,666.43	- 0 -	- 0 -	15,666.43	4	- 0 -
1949	7.88	- 0 -	- 0 -	7.88	2	- 0 -
Totals	\$179,588.37	\$9,642.00	\$132.00	\$169,814.37	114	

Nick Papadakis' Commercial Accounts @ Sec. 1st Bk. - San Pedro

1942	\$102,430.31	\$50,136.00	\$1,068.66	\$ 51,225.65	1,556
1943	187,380.19	89,471.00	64.84	97,844.35	2,129
1944	242,722.45	112,474.00	110.47	130,137.98	2,487
1945	245,530.15	71,936.00	111.60	173,482.55	2,467
1946 #1	25,447.53	9,371.00	- 0 -	16,076.53	334
1946 #2	46,065.33	14,416.00	- 0 -	31,649.33	578
1946 #3	49,356.68	8,512.00	.77	40,843.91	414
1947	99,746.03	26,020.00	- 0 -	73,726.03	594
1948	126,333.39	21,580.00	3.30	104,750.09	1,014
Totals	\$1,125,012.06	\$403,916.00	\$1,359.64	\$719,736.42	11,573

Nick Papadakis' Commercial Accounts - Currency Deposits

	<u>Number Deposits of \$1,000.00 or More</u>	<u>Largest Deposit</u>
1942	7	\$1,500.00
1943	38	2,373.00
1944	40	2,200.00
1945	16	2,103.00
1946	9	1,800.00
1947	4	3,450.00
1948	2	1,365.00

Anchor Liquors - Commercial Account @ Sec. 1st Bk. - San Pedro

Large Currency Deposits

<u>Year</u>	<u>Number Deposits of \$1,000.00 or More</u>	<u>Largest Deposit</u>
1946	14	\$5,750.00
1947	30	2,484.00
1948	47	7,725.00

Anchor Liquors Account appears to reflect the normal activities of the liquor business.

Case No. 22-30 vs. Papadakis
for EXHIBIT 74
Date JUL 25 1952 No. 74 IDENTIFICATION
Date JUL 25 1952 No. 74 IN EVIDENCE
Clerk, U.S. District Court, Sou. Dist. of Calif.
W. H. H. H. H. Deputy Clerk

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Nick and Catina (Katina; Catena) Papadakis
Schedule of Assets and Liabilities
(Exclusive of Cash on Hand)

A S S E T S:		12-31-41	12-31-42	12-31-43	12-31-44	12-31-45	12-31-46	12-31-47	12-31-48
Cash in Banks-Savings Accounts		\$ 5,643.33	\$ 5,384.79	\$26,825.70	\$14,459.23	\$ 575.75	\$20,631.25	\$ 6,120.34	\$ 786.77
Cash in Banks-Commercial Accounts		2,359.18	7,558.64	9,718.98	20,260.81	17,015.70	14,907.77	3,807.12	5,238.63
United States War Bonds		-0-	150.00	3,150.00	14,400.00	58.25	58.25	-0-	-0-
United States Treasury Notes		-0-	-0-	-0-	-0-	14,500.00	14,500.00	64,500.00	64,500.00
Receivable from Sons, C. N. & George		-0-	-0-	-0-	-0-	-0-	4,000.00	4,000.00	4,000.00
Trust Deeds Receivable:									
Bardsen & Knutsen		-0-	6,356.37	-0-	-0-	-0-	-0-	-0-	-0-
Borger & Naome Borreson		2,811.13	1,817.37	-0-	-0-	-0-	-0-	-0-	-0-
Harry & Helen Hirsch		-0-	-0-	-0-	-0-	-0-	-0-	14,949.99	-0-
Robert Ivon		-0-	-0-	2,200.00	-0-	-0-	-0-	-0-	-0-
Lands and Buildings:									
Acquired	Description	A d d r e s s							
1916	Building	536-540 12th Street, San P.	9,500.00	9,500.00	9,500.00	9,500.00	-0-	-0-	-0-
1922	Home	1405 S. Meyeler " " "	23,500.00	23,500.00	23,500.00	23,500.00	23,500.00	23,500.00	23,500.00
1923	Brick Building	" " "							
	"La Salle Hotel"	255 W. 7th Street, " "	61,000.00	61,000.00	61,000.00	61,000.00	61,000.00	61,000.00	61,000.00
1931	Garage	273 West 7th " " "	11,000.00	-0-	-0-	-0-	-0-	-0-	-0-
1932	Frame Building	1022 14th " " "	3,000.00	3,000.00	3,000.00	-0-	-0-	-0-	-0-
1932	" "	1325-31 13th " " "	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
1934	" "	1557 West 7th " " "	3,500.00	3,500.00	-0-	-0-	-0-	-0-	-0-
1935	" "	1561 " 7th " " "	3,500.00	3,500.00	-0-	-0-	-0-	-0-	-0-
1935	Lot & Cabin	Lake Arrowhead, California"	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00
	Brick Building	" " "							
1938	"Mission Hotel"	255 West 7th Street, San P.	28,200.00	28,200.00	28,200.00	28,200.00	28,200.00	28,200.00	28,200.00
1943	Frame Building	477-485 W. 22d Street, " "	-0-	-0-	16,850.00	16,850.00	16,850.00	16,850.00	16,850.00
1943	Brick Building	331-335 W. 6th " " "	-0-	-0-	22,000.00	22,000.00	22,000.00	22,000.00	22,000.00
1944	Apartment	536-542 W. 23d " " "	-0-	-0-	-0-	14,000.00	14,000.00	14,000.00	14,000.00

Case No. 22,230-20
vs. Papadakis
EXHIBIT
Date JUL 25 1952 No. 75 IDENTIFICATION
Date JUL 25 1952 No. 75 IN EVIDENCE
Clerk U. S. District Court, Sou. Dist. of Calif.
Deputy Clerk

ND

NICK AND KATINA (KATINA) PAPADAKIS

SCHEDULE OF ASSETS, LIABILITIES, AND NET WORTH
December 31, 1944 to December 31, 1949

Case No. Exhibit
 Date Aug 1, 1952 No.
 Date Aug 1, 1952 No.
 Clerk, U. S. District Court, Sou. Dist. of Calif.
Deputy Clerk

ASSETS

	December 31 1944	December 31 1945	December 31 1946	December 31 1947	December 31 1948	December 31 1949
Cash in Bank - Savings Account	\$ 14,459.23	\$ 575.75	\$ 20,631.25	\$ 6,120.34	\$ 786.77	\$ 794.65
Cash in Bank - Commercial Account	20,260.81	17,015.70	14,907.77	3,807.12	5,238.63	3,213.04
United States War Bonds	14,400.00	58.25	58.25			
United States Treasury Notes						
Receivable from Sons - C.N. and George		14,500.00	14,500.00	64,500.00	64,500.00	64,500.00
Trust Deed Receivable - Harry and Helen Hirsch			(26,050.00)	(17,550.00)	(12,150.00)	(5,000.00)
				14,949.99		

LAND AND BUILDINGS

Date Acquired	Description					
1916	Building	536-540 12th Street	9,500.00			
1922	Home	1405 S. Meyler Street	23,500.00	23,500.00	23,500.00	23,500.00
1923	La Salle Hotel	255 W. 7th Street	61,000.00	61,000.00	61,000.00	61,000.00
1932	Frame	1325-31 13th Street	7,500.00	7,500.00	7,500.00	7,500.00
1935	Lot & Cabin	Lake Arrowhead	1,200.00	1,200.00	1,200.00	1,200.00
1938	Mission Hotel	255 W. 7th Street	28,200.00	28,200.00	28,200.00	28,200.00
1943	Frame	477-485 W. 22nd Street	17,272.41	17,272.41	17,272.41	17,272.41
1943	Brick	331-335 W. 6th Street	22,000.00	22,000.00	22,000.00	22,000.00
1944	Apartment	536-542 W. 23rd Street	14,000.00	14,000.00	14,000.00	14,000.00
1944	Store	381-385 W. 6th Street	30,000.00	30,000.00	30,000.00	30,000.00
1944	Store	1221-1227 S. Pacific	35,100.00	35,100.00	35,100.00	35,100.00
1945	Store	258-276 W. 6th Street	68,250.00	68,250.00	68,250.00	68,250.00
1947-8	Store	1039 Wilmington-San Pedro Road		4,500.00	32,723.99	35,981.25
1948	Building	301-303 W. 6th Street			40,500.00	40,500.00
1949	Building	19th and Santa Fe			(7,000.00)	16,600.64
1949	Building	1308 Santa Fe				17,118.76
Automobiles						
Furniture for Hotel						
Liquor Inventory at 2200 S. Pacific						
Liquor Inventory at 267 W. 7th Street						
Total Assets			\$318,787.35	\$351,242.53	\$429,604.46	\$505,020.47

LIABILITIES

Real Estate Loan	\$ 13,000.00	\$ 12,750.00				
Bank Loans					\$ 14,000.00	
Due to C.N. and George Papadakis	(30,163.91)	(46,925.43)	(49,053.24)	(49,053.24)	(49,053.24)	(49,053.24)
Due to Ernest Papadakis				(23,714.91)	(51,495.83)	(71,989.14)
Total Liabilities	\$ 43,163.91	\$ 59,675.43	\$ 49,053.24	\$ 72,768.15	\$ 114,549.07	\$ 120,982.38
NET WORTH	\$275,623.44	\$301,567.10	\$343,256.21	\$356,836.31	\$366,527.33	\$384,038.09

NOTE: Brackets indicate figures different from Government Exhibit "89"

Prepared by
 Martha O'Sullivan, C.P.A. of the firm
 Gabrielson, O'Sullivan, Poulson & Co.,
 Certified Public Accountants, Los
 Angeles, to supplement oral testimony

NICK AND CATINA [KATINA] PAPADAKIS
ANALYSIS OF CHANGES IN NET WORTH
YEARS 1944 - 1949

7/29/52

NE

	1945	1946	1947	1948	1949
Net worth - beginning of year	27562344	30156710	34325621	35683631	36652733
Net income from Hotel & Rental Properties	3968389	5596357	2036125	3336474	2504192
Interest income	7966	4050	97219	179144	162038
Gain or loss on sale of capital assets	151308				
Unaccounted for increase in cash	490305	497960	435366	916899	133322
Total	4315346	6098367	2568710	3426517	2532908
Less Deductions	100000	169944	100000	100000	106750
Net Taxable Income	4215346	5928423	2468710	3326517	2426158
Less Federal income tax paid	1260980	1399512	750700	196540	200082
Less Normal Living Expenses, Gifts, Etc	2954366	4528911	1718010	3129977	2226076
	360000	360000	360000	2160875	475000
Increase in Net Worth	2594966	4168911	1358010	969102	1751076
Net worth - end of year	30156710	34325621	35683631	36652733	38403809

NF

7/29/52

NICK AND CATINA [KATINA] PAPADAKIS
RECOMPUTATION AND RECONCILIATION OF "UNREPORTED INCOME"
YEARS 1945 TO 1949 INCLUSIVE

Cas. No. _____
vs. _____
EXHIBIT
Date AUG 1 - 1952 No. _____ IDENTIFICATION
Date AUG 1 - 1952 No. _____ IN EVIDENCE
Clerk, U. S. District Court, Sou. Dist. of Calif.

Deputy Clerk

"Unreported Income" per Government Exhibit "88"

Add: Amount of Receivable from C.N. and George Not
Shown on Exhibit "88" [Exhibit "88" Shows Only
\$4000.00 Each Year]
Construction In Progress at 1944 and Santa Fe
Not Shown on Exhibit "88"

TOTAL ADDITIONS
TOTAL

Deduct:

Error on Exhibit "88" Showing Addition of Capital Loss
Additional Gifts Shown on Exhibit "88"
Net Income of C.N. & George Papadakis Remaining in Commercial
Bank Account
Net Income of Ernst Papadakis Remaining in Commercial Bank Account
Collection of Account Receivable Considered as Income on Exhibit "88"
Payment of Bank Loan Considered as Income on
Exhibit "88"

TOTAL DEDUCTIONS

"Unreported Income" as Adjusted

PROOF:

Net Income for Maximum Tax Computation [Before
Deduction for Dependents and Personal Exemption]

Reported Adjusted Gross Income

"Unreported Income"

One-Half Applicable to Nick Papadakis

NOTE: Brackets indicate income over-reported on original return.

1945	1946	1947	1948	1949
2082294	344654	4294912	4239528	3444029
	2205000			
			700000	
-	2205000	-	700000	-
2082294	1860346	4294912	4939528	3444029
151308			52497	
1676152	212781			
		2371491	2778092	2043331
		850000	540000	715000
				700000
1827460	212781	3221491	3370589	3458331
254834	1647565	1073421	1568939	[14302]
3670900	5264823	2136910	2954751	2003004
3416066	3617258	1063489	1385812	2017306
254834	1647565	1073421	1568939	[14302]
127417	823783	536711	784470	[7151]

Prepared by
Martha O'Sullivan, C.P.A. of the firm
Gabrielson, O'Sullivan, Poulson & Co,
Certified Public Accountants, Los
Angeles, to supplement oral testimony.

NICK AND CATINA [KATINA] PAPADAKIS
TAXABLE INCOME COMPUTATIONS
YEARS 1945 TO 1949 INCLUSIVE

7/29/52

N G

	1945	1946	1947	1948	1949
Net Worth - End of Year	30156710	34325621	35683631	36652733	38403809
Less Net Worth - Beginning of Year	27562344	30156710	34325621	35683631	36652733
Increase in Net Worth	2594366	4168911	1358010	969102	1751076
Add: Living Expenses and Gifts	360000	360000	360000	2160875	415000
Federal Income Tax Paid	1260980	1399512	750700	196540	200000
	4215346	5928423	2468710	3326517	243652
Less: Depreciation	620100	663600	331800	371766	42354
	3595246	5264823	2136910	2954751	201298
Add: One half of Capital Loss	75654				
Net Income Before Exemptions	3670900	5264823	2136910	2954751	201298
Less Personal Exemptions and Exemptions for Dependents	100000	100000	100000	240000	200000
Net Income For Maximum Tax Computation	3570900	5164823	2036910	2714751	0

NICK PAPADAKIS
Summary of Various Tax Computations

7/30/52

YEAR	ORIGINAL RETURN ASSESSED AND PAID	TAX SHOWN ON INDICTMENT	GOVERNMENT'S REVISED TAX	TAX ON TENTATIVE AMENDED RETURNS	RECOMPUTED TAX		AVERAGE PROBABLE LIABILITY BETWEEN THE TWO
					MINIMUM	MAXIMUM	
1945	572256	2309650	1135586	674927	538149	666289	602219
1946	545598	No INDICTMENT [INCOME OVERREPORTED PER GOVERNMENT FIGURES]		1034578	280919	1010442	645682
1947	87640	937598	1008642	266499	75053	257462	166258
1948	100041	1181794	966400	379646	176546	356751	266649
1949	182045	275096	922699	273158	148945	194866	171956

Case No. _____
vs. _____
EXHIBIT _____
Date AUG 1 1952 No. _____ IDENTIFICATION
IN EVIDENCE
Court, Sou. Dist. of Cal.
Deputy Clerk

Prepared by
Martha O'Sullivan, C.P.A. of the firm
Gabrielson, O'Sullivan, Poulson & Co,
Certified Public Accountants, Los
Angeles, to supplement oral testimony.

No. 13772.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

C. N. PAPADAKIS, also known as GUS PAPADAKIS,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

WALTER S. BINNS,
United States Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division,

JAMES K. MITSUMORI,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

JUL 20 1953

PAUL P. O'BRIEN
CLERK

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No. 13772.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. N. PAPADAKIS, also known as GUS PAPADAKIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

Jurisdiction.

C. N. Papadakis, also known as Gus Papadakis, appellant herein, was indicted under Section 145(b) of the Internal Revenue Code, United States Code, Title 26, Section 145(b).

The District Court had jurisdiction under Section 3231 of Title 18, United States Code. The offenses charged were committed in the Southern District of California. Judgment was entered on August 25, 1952, and Notice of Appeal was filed on the same date.

This Court has jurisdiction under Rule 37(a) of the Federal Rules of Criminal Procedure and Section 1291 of Title 28, United States Code.

II.

Statute Involved.

The Indictment in this case was brought under Section 145(b) of the Internal Revenue Code, United States Code, Title 26, Section 145(b), which provides in pertinent part:

“* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.”

III.

Statement of the Case.

On March 12, 1952, the Federal Grand Jury returned an Indictment in sixteen counts in the United States District Court for the Southern District of California wherein C. N. Papadakis, appellant herein, was named as a defendant in all sixteen counts. In Counts I to VIII, inclusive, appellant's father, Nick Papadakis, was charged as a co-defendant while appellant was charged alone in Counts IX to XVI, inclusive.

Count I of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return on behalf of Nick Papadakis for the calendar year 1945 wherein it was stated that the net income computed on a community property basis was \$16,580.33 and the tax owing thereon was \$5,722.56; whereas, the net income computed on a community property basis for the calendar year 1945 was \$43,495.15 and the tax owing thereon was \$23,096.50.

Count II of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return for the calendar year 1945 on behalf of Katina Papadakis, wife of Nick Papadakis and mother of appellant, wherein it was stated that the net income computed on a community property basis was \$16,580.33 and the tax owing thereon was \$5,722.56; whereas the net income computed on a community property basis for the calendar year 1945 was \$43,495.15 and the tax owing thereon was \$23,096.50.

Count III of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return for the calendar year 1947 on behalf of Nick Papadakis, wherein it was stated that the net income computed on a community property basis was \$4,817.44 and the tax owing thereon was \$876.40; whereas the net income computed on a community property basis for the calendar year 1947 was \$25,024.59 and the tax owing thereon was \$9,375.98.

Count IV of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return for the calendar year 1947 on behalf of Katina Papadakis, wife of Nick Papadakis and mother of appellant, wherein it was stated that the net income computed on a community property basis was \$4,817.44 and the tax owing thereon was \$876.40; whereas the net income computed on a community property basis for the calendar year 1947 was \$25,024.59 and the tax owing thereon was \$9,375.98.

Count V of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return for the calendar year 1948 on behalf of Nick Papadakis, wherein it was stated that the net income computed on a community property basis for said calendar year was \$6,429.06 and the amount of tax owing thereon was \$1,000.41, whereas the net income computed on a community property basis for the calendar year 1948 was \$31,574.53 and the tax owing thereon was \$11,817.94.

Count VI of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return for the calendar year 1948 on behalf of Katina Papadakis, wife of Nick Papadakis and mother of appellant, wherein it was stated that the net income computed on a community property basis was \$6,429.06 and the amount of tax owing thereon was \$1,000.41; whereas the net income computed on a community property basis for the calendar year 1948 was \$31,574.53 and the tax owing thereon was \$11,817.94.

Count VII of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return in behalf of Nick Papadakis for the calendar year 1949 wherein it was stated that the net income computed on a community property basis was \$9,586.53 and the tax owing thereon was \$1,820.45; whereas the net income computed on a community property basis for the calendar year 1949 was \$12,539.00 and the tax owing thereon was \$2,750.96.

Count VIII of the Indictment charged that C. N. Papadakis and Nick Papadakis evaded a large part of the income tax due and owing the United States by filing a false return for the calendar year 1949 on behalf of Katina Papadakis, wife of Nick Papadakis and mother of appellant, wherein it was stated that the net income computed on a community property basis was \$9,586.53 and the tax owing thereon was \$1,820.45; whereas the net income computed on a community property basis for the calendar year 1949 was \$12,539.01 and the tax owing thereon was \$2,750.96.

Count IX of the Indictment charged the appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by him by filing a false return for the calendar year 1946 on behalf of himself, wherein it was stated that the net income computed on a community property basis was \$4,038.95 and the tax owing thereon was \$510.00; whereas the net income computed on a community property basis for the calendar year 1946 was \$5,910.27 and the tax owing thereon was \$1,022.94.

Count X of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by his wife, by filing a false return for the calendar year 1946 on behalf of Helene Papadakis, wife of said C. N. Papadakis, wherein it was stated that the net income computed on a community property basis for the calendar year 1946 was \$4,038.95 and the tax owing thereon was \$615.00; whereas the net income computed on a community property basis for the calendar year 1946 was \$5,910.28 and the tax owing thereon was \$1,146.34.

Count XI of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by him, by filing a false return for the calendar year 1947 on behalf of himself, wherein it was stated that the net income computed on a community property basis for said calendar year was \$2,921.69 and the tax owing thereon was \$405.00; whereas the net income computed on a community property basis for the calendar year 1947 was \$7,330.84, and the tax owing thereon was \$1,528.79.

Count XII of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by his wife, by filing a false return for the calendar year 1947 on behalf of Helene Papadakis, wife of said C. N. Papadakis, wherein it was stated that the net income computed on a community property basis for the calendar year 1947 was \$2,921.69 and the tax owing thereon was \$308.00; whereas the net income computed on a community property basis for the calendar year 1947 was \$7,330.84, and the tax owing thereon was \$1,386.29.

Count XIII of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United State by him, by filing a false return for the calendar year 1948 on behalf of himself, wherein it was stated that the net income computed on a community property basis for said calendar year was \$4,584.85, and the tax owing thereon was \$510.00; whereas the net income computed on a community property basis for the calendar year 1948 was \$9,092.30, and the tax owing thereon was \$1,676.37.

Count XIV of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by his wife, by filing a false return for the calendar year 1948 on behalf of Helene Papadakis, wife of said C. N. Papadakis, wherein it was stated that the net income computed on a community property basis for the calendar year 1948 was \$4,584.85, and the tax owing thereon was \$510.00; whereas the net income computed on a community property basis for the calendar year 1948 was \$9,092.31, and the tax owing thereon was \$1,676.37.

Count XV of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by him, by filing a false return for the calendar year 1949 on behalf of himself, wherein it was stated that the net income computed on a community property basis for said calendar year was \$6,506.40, and the tax owing thereon was \$1,018.10; whereas the net income computed on a community property basis for the calendar year 1949 was \$8,795.64, and the tax owing thereon was \$1,598.05.

Count XVI of the Indictment charged appellant, C. N. Papadakis, alone with evading a large part of the income tax due and owing the United States by his wife, by filing a false return for the calendar year 1949 on behalf of Helene Papadakis, wife of said C. N. Papadakis, wherein it was stated that the net income computed on a community property basis for the calendar year 1949 was \$6,506.40, and the tax owing thereon was \$1,018.10, whereas the net income computed on a community property basis for the calendar year 1949 was \$8,795.63, and the tax owing thereon was \$1,598.05. [Clk. Tr. pp. 2-15.]

A Motion to Dismiss the Indictment was filed on April 2, 1952, and was denied on April 7, 1952. A Motion for Bill of Particulars was also filed on April 2, 1952, and granted on April 7, 1952. The Bill of Particulars was filed on April 10, 1952. [Clk. Tr. pp. 28-35.] Both C. N. Papadakis, appellant herein, and Nick Papadakis pleaded not guilty as to all counts applicable to them on April 7, 1952, and the case was set for jury trial on July 21, 1952, at which time trial began. At the close of the Government's case, on July 29, 1952, both defendants moved for judgment of acquittal and the motion as to each was denied on July 30, 1952. [Clk. Tr. p. 45.] On August 5, 1952, the jury returned a verdict of guilty as to all counts of the Indictment in which each defendant was charged, namely, Counts I to VIII, inclusive, as to both defendants and Counts I to XVI, inclusive, as to appellant C. N. Papadakis. [Clk. Tr. pp. 83-85.]

Motions for New Trial were filed as to each defendant and denied as to each. The judgment of the Court was that the defendant Nick Papadakis was fined the sum of \$1,000.00 on each of Counts I to VIII, inclusive, or a total of \$8,000.00, and that appellant C. N. Papadakis was sentenced to ten months' imprisonment as to each of the sixteen counts of the Indictment, to run concurrently, and to pay a fine of \$200.00 as to each of the sixteen counts, or a total fine of \$3,200.00. [Clk. Tr. pp. 88-89.]

An appeal to this Honorable Court was filed by the defendant, C. N. Papadakis, only.

IV.

Statement of Facts.

The Government relies upon the following facts:

Appellant C. N. Papadakis, more commonly known as Gus Papadakis, and therefore hereinafter in this brief referred to as Gus Papadakis, and Nick Papadakis are son and father, respectively. For many years Nick Papadakis was a resident of San Pedro, California, where he was engaged in various business enterprises [Rep. Tr. p. 494], and through the years he accumulated a substantial number of hotels and income producing real estate. [See Ex. 89—Net Worth Statement.]

During the years set forth in the Indictment, that is, 1945 through 1949, Nick Papadakis derived his income from the operation of the LaSalle Hotel and from real estate rentals. In 1947 one of his other sons, Ernest Papadakis, was taken in as a partner, and Nick Papadakis reported his income on a partnership basis for the years 1947 to 1949. [Exs. 29, 30, 31.] Ernest Papadakis did not contribute any capital to the partnership. During this same period, Nick Papadakis acquired other real estate in San Pedro in his own name. [Ex. 89.]

About 1940 the Papadakis family owned two retail package liquor stores. One of the stores was operated in the name of appellant, Gus Papadakis, and the other in the name of another son of Nick Papadakis, namely, George Papadakis. During World War II appellant and his brother George were in the military service, the liquor stores were operated by their father, Nick Papadakis. The income from the operation of the stores, however, was reported by appellant and his brother George. [Rep. Tr. p. 486.]

In the fall of 1945, appellant Gus Papadakis returned from military service, and the next year he and his brother George formed a partnership of the two liquor stores under the name of Anchor Liquors. By 1949 two other liquor stores were added. Appellant Gus and his brother George filed partnership returns for the Anchor Liquor Stores for the calendar years 1946 through 1948. [Exs. 25, 26, 27.] In 1949 two additional members of the Papadakis family were taken in as partners, and the income was so reported on that basis for the year 1949. [Rep. Tr. p. 485; Ex. 28.]

The Government did not question the validity of the partnership formed by Nick Papadakis and Ernest Papadakis for the LaSalle Hotel and rental properties; nor did it question the validity of the Anchor Liquor Stores partnership.

The books for the LaSalle Hotel and the rental properties, which made up the sole source of income for Nick Papadakis, were simple and incomplete. These books were kept by Nick Papadakis, his son Ernest, and by other members of the family.

The Anchor Liquor Stores books were equally simple and incomplete. Each store comprising the Anchor Liquor partnership kept its own set of books, one showing receipts and the other showing expenditures. However, the bulk of the merchandise for the Anchor Liquor Stores was purchased through and by the store located at 1227 South Pacific Boulevard which was under the direct management of appellant Gus Papadakis.

The income tax returns for the Papadakis family enterprise in the years prior to the calendar year of 1946 were prepared by an accountant, Paul Hoffman. Nick

Papadakis compiled the income and expenses figures for the various family enterprises, and consulted the accountant for the preparation of the various tax returns. [Rep. Tr. p. 455.]

After the discharge of appellant Gus Papadakis from military service in 1945, he took over the supervision and management of his father's affairs [Rep. Tr. p. 651], and in December of 1947 his father executed a general power-of-attorney to him. He assumed the responsibility of assembling the figures for all of the Papadakis family enterprises [Rep. Tr. p. 481] and consulted Paul Hoffman, the accountant, in regard to tax return preparation.

The income and expense figures for the LaSalle Hotel and rental properties were brought to the accountant on consolidated work sheets rather than a work sheet for each individual income producing unit. Likewise, the income and expense figures for all Anchor Liquor Stores were consolidated into one work sheet and were brought to the accountant. These work sheets for both the Nick Papadakis enterprises and for the Anchor Liquor Stores were prepared by appellant Gus Papadakis for the taxable years 1945 to 1949, inclusive.

The books of the various Papadakis family business enterprises were never audited by the accountant, nor were they ever seen or used by the accountant as a basis for the preparation of the tax returns. [Rep. Tr. p. 136.]

Leonard Mattis, the employee of Paul Hoffman, who for years had prepared the tax returns for the Papadakis family, met appellant Gus Papadakis for the first

time in the office of Paul Hoffman in March of 1948 relative to the preparation of the 1947 tax returns. [Rep. Tr. pp. 131-133.] A conference was held at that time at which Paul Hoffman, Leonard Mattis and appellant Gus Papadakis were present. Leonard Mattis was told that the gross receipts were cut from year to year and also that the inventory was juggled from year to year. Mattis stated that this was "risky, was it not," and he was told that they had been getting away with it for years. [Rep. Tr. p. 132.] Based upon the consolidated work sheets prepared and brought in by appellant Gus Papadakis, Mattis, under the instructions of appellant Gus Papadakis, prepared a tentative tax return showing the tentative tax liability of Nick Papadakis based upon income from the LaSalle Hotel and the rental properties, and for appellant Gus Papadakis based upon his income from the Anchor Liquor Stores. The tentative returns were then discussed with appellant, Gus Papadakis, only, and he usually said that the tax was too high and that cuts would have to be made. At the instruction of appellant, Gus Papadakis, the gross receipts would be cut in amounts desired by appellant, expenses would be increased, and major improvements would be charged off in one year as ordinary repair in order to decrease the net profit. [Rep. Tr. pp. 136-138, 142.]

In 1947, for the LaSalle Hotel the gross receipts were reduced by \$8,000.00 [Rep. Tr. p. 143]; the repair expenses were increased by \$4,000.00; supplies by \$4,000.00, and telephone expense by \$2,000.00.

In 1948, the LaSalle Hotel gross receipts were cut by \$10,000.00 [Rep. Tr. pp. 147-148, 159-160] and other expenses were increased by about \$2,000.00. [Ex. 69.]

For the year 1948, Leonard Mattis was asked by appellant Gus Papadakis to compute the tax savings to his father, Nick Papadakis, by not including in his return as income the rental income paid to Nick by the Anchor Liquor Stores. Gus at that time stated that he would collect from his father the additional tax that Anchor Liquors would have to pay by not claiming the rental payments as expenses on that return. The final result was that \$7,200.00 which was paid to Nick Papadakis in rental was left out of Nick's return as income and deleted as expense of the Anchor Liquor Stores. [Rep. Tr. p. 168.]

For the calendar year 1946, based upon work sheets made available to him, Mattis testified that purchases were increased by \$5,000.00 for the Anchor Liquors. [Rep. Tr. p. 155; Ex. 70.] For the year 1947, purchases were increased \$10,000.00 to \$15,000.00 to decrease the net profits. In 1948 purchases were increased by \$13,030.00 for Anchor Liquors, and other expenses were increased by \$1,970.00, or a total of \$15,000.00. [Ex. 71.]

For the year 1949, the closing inventory for Anchor Liquors was decreased by \$5,000.00 in order to reflect lower net profit. [Ex. 72.] This was done while the agents were still in the process of their investigation. This practice of cutting the gross receipts, increasing the purchases and expenses, and juggling the inventory, for both the Nick Papadakis enterprises and the Anchor Liquors for the years in question, were made at the direction and under the instructions of appellant Gus Papadakis, alone.

After the final returns were prepared by Leonard Mattis all returns for each member of the Papadakis family

were turned over to appellant Gus Papadakis. Gus then signed the returns of Nick and Katina Papadakis for the years 1945 through 1948; he signed the LaSalle Hotel partnership returns for the years 1947 and 1948; he signed the returns for his wife, Helene, for the years 1946, 1947, 1948 and 1949; and he signed the Anchor Liquors partnership returns for the years 1946, 1947, 1948 and 1949. [Rep. Tr. pp. 486-489.]

Agent Wilbur and Agent Vitello of the Bureau of Internal Revenue first entered upon investigation of this case in June, 1949. [Rep. Tr. p. 219.] Agent Wilbur first made an audit of the Anchor Liquor Stores' books. After the audit he discovered substantial discrepancies in purchases from that reported as purchases on tax returns for the years 1946, 1947 and 1948. [Rep. Tr. pp. 227 and 235.] These discrepancies were brought to the attention of appellant, Gus Papadakis, but Gus did not explain the discrepancies, and merely said there must be some reconciliation. The agents had all discussion relative to Anchor Liquors with appellant, Gus Papadakis.

On July 7, 1949, in the storeroom of the 1227 South Pacific Boulevard store, appellant, Gus Papadakis, offered a \$1,000.00 bribe, then a \$1,500.00 bribe to Agent Wilbur [Rep. Tr. pp. 237-238], which of course was refused, and Agent reported same to his superior.

The Agent then switched his investigation to the LaSalle Hotel, and from an audit of the books, he found that the rentals paid by Anchor Liquors in 1946, 1947 and 1948 did not appear on the books. The Agent then asked appellant, Gus Papadakis, why rentals for 1948 were not paid to his father, Nick Papadakis, and Gus

replied that the rent payment, if included, would throw his father's income into a higher bracket. [Rep. Tr. p. 244.] Further investigation of the books of the LaSalle Hotel and rental properties disclosed inaccuracy and failure to reflect a true picture of the income of Nick Papadakis. Accordingly, the Agents compiled a net worth statement, which was admitted to by Nick Papadakis in March, 1950. [Ex. 75.] A net worth statement for Nick and Katina Papadakis, introduced during the course of the trial as Exhibit 89 and substantially the same as Exhibit 75, reflects an increase in the net worth of Nick and Katina Papadakis from \$305,787.35 as of December 31, 1944, to \$504,020.47 at the end of the year 1949. Based upon said net worth statement, the unreported income of Nick and Katina Papadakis was computed as \$20,822.84 for the year 1945; \$42,949.12 for the year 1947; \$42,395.28 for the year 1948; and \$34,440.29 for the year 1949. [Ex. 88.]

During the period last above mentioned, Nick Papadakis admittedly purchased assets, the cost of which far exceed the income that he reported during the same period. His explanation was that he had about \$150,000.00 in cash at the time Roosevelt was inaugurated in 1933, which cash was kept in a metal box. This theory or explanation was maintained only until a Certified Public Accountant, namely, Martha O'Sullivan, was retained by the Papadakis family to prepare a net worth statement on behalf of Nick and Katina Papadakis. Miss O'Sullivan explained the increase in the assets of Nick and Katina Papadakis on the theory that Nick Papadakis borrowed \$120,000.00 [Ex. 34] from his sons during the period in question. [See Ex. 34.]

In addition to reliance upon the net worth method showing unreported income as to Nick Papadakis, the Government also proved direct items of unreported income. For example, there was complete omission of rents paid to Nick Papadakis by the Salvation Army [Ex. 37], and also of rents paid by check by Anchor Liquors [Ex. 78; Rep. Tr. pp. 283-284], and of rents paid by other tenants. [Rep. Tr. pp. 279-283; Ex. 77-B.]

The Agent further showed that after the first audit, which audit was made by Agent Wilbur, the rental receipt books for the LaSalle Hotel and rental properties were altered to reflect an increase in rent receipts over and above that which the Agents found upon their initial examination of the books. The evidence further showed that at the close of a conference in June, 1950, at the Federal Building, Nick Papadakis offered a \$10,000.00 bribe to Agent Vitello to settle his tax liability. [Rep. Tr. p. 501.]

Although the net worth and expenditure method was applied as to Nick Papadakis in determining unreported income, the direct item method was applied to prove unreported income of appellant, Gus Papadakis, as to Counts IX to XVI inclusive. This was determined by an independent examination and audit of the books and records of Anchor Liquors by Agent Wilbur. His examination and findings corroborated substantially the testimony given by Leonard Mattis, the accountant. Based on Agent Wilbur's analysis, found in Exhibit 82, it reflects that for the years 1946 through 1949, appellant Gus Papadakis and his wife, Helene, had additional income in the sum of \$26,248.05 more than that reported on the tax returns for those years.

ARGUMENT.

I.

The Evidence Against Nick Papadakis on the Net Worth and Expenditure Method and Other Matters Was Not Used Against the Appellant, C. N. (Gus) Papadakis.

As stated in this brief under the Statement of Facts, the Government relied upon the net worth and expenditures method to show unreported income as to Nick Papadakis as to Counts I to VIII inclusive. Exhibit 89 represented the Government's summary of the assets and liabilities that made up the net worth of Nick and Katina Papadakis. This summary was based upon evidence that had previously been admitted during the course of the trial, much of which was by stipulation. It was clear that this evidence was applicable as to Nick Papadakis only. [Rep. Tr. pp. 89, 93, 95-98.]

Exhibit 75 was a net worth statement prepared by Agent Wilbur in 1950 and signed by Nick Papadakis in March, 1950. This was introduced in evidence, and the Court properly ruled that it was to be received in evidence as to Nick Papadakis only. [Rep. Tr. p. 270.]

Exhibit 34 was a net worth statement prepared on behalf of Nick Papadakis and appellant, Gus Papadakis, by Certified Public Accountant Martha O'Sullivan. It was received in evidence. [Rep. Tr. p. 583.] It was clear that Exhibit 34 could have reference to Nick Papadakis only inasmuch as it was prepared for the purpose of explaining the increase in the net worth of Nick Papadakis during the years in question. Further, the Court in its instructions to the jury, clearly stated that the net worth statement on which the Government relied for its proof

of additional taxes due on the net worth method applied to Nick Papadakis only. [Tr. p. 1057.]

With reference to conversations had outside the presence of appellant Gus Papadakis, the Court, on this particular point, thoroughly instructed the jury that it was not to consider as evidence any statement that was made outside the presence of the defendant, Gus Papadakis, appellant herein. [Rep. Tr. p. 1064.]

II.

The Evidence Was Sufficient Against Appellant, C. N. (Gus) Papadakis to Sustain a Conviction.

Appellant offers no argument as to the sufficiency of the evidence against him as to the counts in the Indictment in which he alone is charged, namely, Counts IX to XVI inclusive. His argument that the evidence was insufficient as to him refers to Counts I to VIII inclusive, in which counts his father, Nick Papadakis, was charged as a principal defendant. The Government's theory with reference to Counts I to VIII inclusive is that appellant was an aider and abettor in the commission of the crimes by Nick Papadakis. The question, therefore, is whether or not the evidence sustains the Government's theory that appellant, Gus Papadakis, aided and abetted his father in the evasion of income taxes for the years 1945, 1947, 1948 and 1949.

The evidence, briefly summarized, showed that appellant Gus Papadakis knew of the scheme by his father to defraud the Government of income taxes [Tr. p. 132];

also that he assumed the responsibility of perpetuating that scheme. It is clear that for the taxable years charged in the Indictment, appellant even promoted the scheme. After his return from military service in the fall of 1945, he assumed full responsibility in the supervision and management of his father's business. [Rep. Tr. p. 651.] He held a general power-of-attorney from his father, which was executed in December of 1947. He assumed the responsibility of gathering income tax data for his father's business enterprises and also for the business enterprises of other members of the Papadakis family, and with this tax data he consulted the accountants and alone directed the preparation of the tax returns by the accountants. After the tax returns for the various members of the Papadakis family had been prepared, appellant, in many instances, signed the returns for each member of the family. He admitted that he analyzed the tax returns for his father and other members of his family. [Rep. Tr. pp. 652-653.]

It is significant that the Government proved the tax evasion for the year 1949 as to both Nick Papadakis and appellant. The returns for 1949 are due on or before March 15, 1950. Appellant's practice in causing false and fraudulent tax returns in the years prior to the calendar year 1949 continued with the 1949 returns and also during part of the year 1950, in spite of the fact that the Agents of the Bureau of Internal Revenue began their investigation in June of 1949. After the Agents had found discrepancies between the books of the various

business enterprises and the tax returns, and had confronted appellant Gus Papadakis with these discrepancies, appellant attempted to dispose of the matter by offering a bribe to Agent Wilbur. Appellant was present at all or most of the conferences which the Agents had with Nick Papadakis. Furthermore, he was consulted by Martha O'Sullivan, accountant later retained for the Papadakis family, with reference to the preparation of the net worth statement for Nick and Katina Papadakis.

It is clear that the evidence is sufficient to sustain the conviction of appellant on the theory of aiding and abetting as to Counts I to VIII inclusive.

This Court has repeatedly stated that it will indulge in all reasonable presumptions in supporting the ruling of the trial court and will consider the evidence in the light most favorable to the prosecution.

Henderson v. United States (C. A. 9), 143 F. 2d 681;

Pasadena Research Laboratories v. United States (C. A. 9), 169 F. 2d 375, cert. den., 335 U. S. 853;

Norwitt v. United States (C. A. 9), 195 F. 2d 127;

Barcott v. United States (C. A. 9), 169 F. 2d 929.

In the last above cited case, *Barcott v. United States*, *supra*, a tax evasion case, the Court said: "In determining whether substantial evidence exists to sustain the verdict, we must view it in the light most favorable to the government."

III.

The Court Did Not Err in Failing to Instruct the Jury on the Subject of Entrapment and the Duty of Each Individual Juror.

There is no merit to appellant's argument that the Court erred in failing to instruct the jury on the subject of entrapment. No evidence was adduced to show entrapment, nor did appellant's counsel predicate the defense in the trial court on the ground of entrapment. The evidence was clear that the criminal design to evade income taxes originated not in the minds of the Government Agents, or in the mind of Leonard Mattis, the accountant who informed the Government, in October of 1948, of the Papadakis tax evasions, but in the mind of appellant. And not only did this criminal design to evade taxes originate in the mind of appellant, but it was perpetuated by appellant, and the evidence so showed. Leonard Mattis first worked on the 1947 calendar year tax returns. He wrote a letter to the Bureau of Internal Revenue in October of 1948, and the Government did not begin its investigation until June of 1949. There was absolutely no evidence of entrapment, and therefore, the Court properly refused the instruction with reference to entrapment.

Sorrell v. United States, 287 U. S. 435.

There is no merit to the argument that the Court erred in refusing to instruct the jury on the subject of an accomplice relative to Leonard Mattis, the accountant. There was no evidence that Leonard Mattis promoted,

in any way, the scheme to defraud the Government of taxes, or that he made the scheme his own, or that he had any interest in defrauding the Government. He was paid a reasonable fee for his services as an accountant, in computing the taxes due and in preparing the final returns for the Papadakis family, and he gained nothing by the false and fraudulent practices carried out by appellant. Further, the evidence clearly showed that Mattis prepared the returns at the sole direction and under the sole instruction of appellant, Gus Papadakis.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of conviction entered by the District Court should be affirmed.

Respectfully submitted,

WALTER S. BINNS,
United States Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division,

JAMES K. MITSUMORI,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 13772

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

C. N. PAPADAKIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 22230 CD.

Upon Appeal From the District Court of the United States
for the Southern District of California, Central Division.

Hon. David W. Ling, District Judge.

APPELLANT'S REPLY BRIEF.

FILED

AUG 6 1953

PAUL P. O'BRIEN
CLERK

RUSSELL E. PARSONS,

202 South Hamilton Drive,
Beverly Hills, California,

Attorney for Appellant C. N. (Gus) Papadakis.

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APPELLANT'S REPLY BRIEF.

In this our Reply Brief we will attempt to avoid repetition and directly answer the argument of Government counsel. We have fully treated the insufficiency of the evidence as to Gus Papadakis and the prejudicial admission of hearsay evidence as to him. It has not been answered. To say that the Court instructed the jury is no answer to the problem. The evidence was received—evidence concerning which no foundation had been laid to show that he had any knowledge thereof. This we have treated in our Opening Brief with some detail.

I.

**The Court Erred in Failing to Properly Instruct on
Accomplice and the Subject of Entrapment.**

(A) Accomplice.

That Mattis was an accomplice there can be little doubt. The Government's brief says, "There was no evidence that Mattis promoted in any way the scheme to defraud the Government of taxes, etc." (App. Br. pp. 21, 22). The testimony of Mattis himself is all to the contrary. He says that he first met Gus in Hoffman's office (the accountant for Papadakis and employer of Mattis); that they were discussing "cutting the gross and changing inventory and had been getting away with it for years." When he asked if it was not risky, Hoffman replied they had gotten away with it in the past [Rep. Tr. pp. 130, 132]. Thus he commenced work on these returns and did so for years thereafter. All of the work sheets were his. They were admitted in evidence, not a pencil mark thereon was made by this appellant. Mattis alone was the author of the figures. According to Mattis, he would make tentative returns and if not satisfactory, he then altered them [Rep. Tr. pp. 143-149]. He even identified Exhibit 71 as a tentative return which was too high. He then raised the amounts for office supplies, refunds, truck repairs, purchases, etc. He said that he then reduced the tentative return from \$30,500.00 to \$18,339.00 on the final return, which he prepared and filed [Rep. Tr. pp. 164-165]; that he reduced the inventory over \$5,000.00 on one return [Rep. Tr. pp. 173, 174]. See Exhibits 72 and 28. He admitted he knew he was committing a felony [Rep. Tr. pp. 185, 186] in making and filing false returns. Bear in mind all of these work sheets were in Mattis' handwriting,

none of it in the appellant's (Gus). That this man was an accomplice there can be no doubt. Many an accountant has been tried and convicted with the principal for much less than the admitted activities of the informant-accomplice Mattis.

THE APPLICABLE LAW.

In *McLendon v. United States*, 19 F. 2d 465, 466, *cert. den.* 258 U. S. 620, 66 L. Ed. 795, the Court said:

“An accomplice is properly defined to be one who is in some way concerned or associated in the commission of the crime; a partaker of the guilt; one who aids or assists or is an accessory. 4 Blacks. Com. 331. And it does not seem doubtful to us that one who first conceives a way to commit a fraud, and the means by which it can be and is committed, and then furnishes the means used to perpetrate it, is an accomplice. An accessory before the fact is an accomplice, within the rules relating to accomplice testimony. 16 C. J. 674, Sec. 1359; *People v. Curlee*, 53 Cal. 604, 607; *Ackley v. United States* (C. C. A.), 200 F. 217, 222; *Johnson v. State*, 58 Tex. Cr. R. 244, 125 S. W. 16, 18; *Davis v. State*, 55 Tex. Cr. R. 495, 117 S. W. 159, 160, 161; *Edwards v. Washington Territory*, 1 Wash. T. 195, 196; *People v. Swersky*, 215 N. Y. 471, 477, 111 N. E. 212.

The evidence in this case so strongly tended to prove that this witness Smith was an accessory and an accomplice of the defendant in the conception and commission of the offense alleged in the indictment in this case that we are unable to resist the conclusion that the court's failure to instruct the jury regarding this issue, and its failure to instruct them with what caution they should consider his testimony, if they concluded he was such an accomplice, was an error

which deprived the defendant of a substantial right in his trial.

Accordingly, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.”

May we also direct the Court’s attention to an old case often cited, *Egan v. United States*, 287 Fed. Rep. 958 at 964, where the Court said:

“In many jurisdictions the law forbids the conviction of an accused upon the uncorroborated testimony of an accomplice. But in this jurisdiction such a conviction may be sustained, provided the jury is admonished by the court that the testimony of an accomplice ‘ought to be received with suspicion, and with the very greatest care and caution.’ (*Freed v. United States*, 49 App. D. C. 392, 394, 266 Fed. 1012, 1014.)

We have no legislative definition of an accomplice. Section 908 of the District of Columbia Code provides:

‘In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories.’

This, however, does not fully meet the case. Nor is section 332, Penal Code U. S. (Comp. St., Sec. 10506), providing that ‘whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal,’ conclusive on this point. The broader and more comprehensive rule is that any one knowingly and voluntarily co-operating with, aiding, assisting, advising,

or encouraging another in the commission of a crime is an accomplice; and this is true, regardless of the degree of his guilt. 1 Russell's Crimes, 49; Wharton's Criminal Evidence, 440; Rice's Criminal Evidence, Sec. 319; Bishop's Criminal Procedure, Sec. 1159."

The law as to accomplices is legion, and the general effect of the decisions is to the effect that where there is evidence that a witness is an accomplice, it is error to fail to properly instruct the jury. (See 22 C. J. S., Vol. 22, Sec. 784, p. 1334.)

In view of the evidence in this case, we again renew our contention that the Court erred in not properly instructing the jury on the law of accomplice, and the appellant was thus denied a fair trial.

(B) Entrapment.

We have covered the evidence quite fully in our statement of the evidence in the Opening Brief, and do not here wish to repeat the same; however, there are some matters we should call the Court's attention to. It must be borne in mind, as we have heretofore pointed out, that Mattis testified that he met Gus, the appellant, when he, Mattis, first went to work for Hoffman, who had made out the returns for years for the Papadakis family, and thereafter it was he who worked up the figures, made out tentative returns, figured and computed the taxes, and then made the final returns. It should be remembered, as we have pointed out heretofore, that in each instance he said that the idea of making improper deductions, of altering the inventory, increasing purchases, increasing expenses, improperly charging expenses, was suggested to him by

Gus. In connection with his testimony it should be kept in mind that for almost three years after he had been to the Government and after he had filed a letter by which he sought to obtain a reward for any money obtained by the Government from the Papadakis family, that he, Mattis, continued to share the confidence of these people; he had lunch with Papadakis, went to his home, and in every instance all of the work sheets in evidence here were in his handwriting; the figures were all his. He says, of course, the idea of alteration or fraud was suggested by Gus. That is his testimony. Gus denies this.

Gus denied that he ever suggested to Mattis that any false returns be made; that any unlawful deductions be made. He states that over the period of years, information had been gathered. It had been taken to Mattis, and that Mattis prepared the returns [Rep. Tr. p. 612]; that the books of the business were kept in the individual stores by the manager there, and the figures were given by the manager to Gus, who assembled them and took them to Mattis [Rep. Tr. pp. 610, 611]; that he never at any time told Mattis to take \$10,000.00, or \$15,000.00, off of the gross receipts; that he never stated he wanted to add to the purchases; that he was aware that all of the distributors from whom they purchased goods kept complete records of sales; that he did talk with Mattis about various items that could properly be deducted as they prepared their returns [Rep. Tr. pp. 613, 615]. That at one time he talked with Mattis about the inventory, Mattis suggesting that it was high, and he replied that business had picked up and they had to carry a larger inventory; that they had a discussion about slow moving or stale merchandise; that he took an accurate inventory and listed every bottle as nearly as he could [Rep. Tr. p. 616], and he dis-

cussed with Mattis how they might legitimately lower their taxes. That he told Mattis the inventory was as complete as he could take it, and Mattis stated that if you have obsolete goods or old goods which you have carried on your shelves, they would have a right to take a deduction from their inventory; that he told Mattis they had considerable of such merchandise [Rep. Tr. pp. 616, 617]; that he went back and inventoried, and he checked the obsolete goods that they had in the stores and in the warehouse, and he estimated it was \$4,000.00 to \$4,500.00 at least, and the inventory was then reduced \$5,000.00 by Mattis, but only after he had rechecked the inventory [Rep. Tr. p. 617]; that he never at any time told Mattis to knock off \$10,000.00; that in his discussions with Mattis they only discussed legitimate ways of reducing the tax; that he gave to Mattis all the figures he had and Mattis made and figured the income tax returns [Rep. Tr. pp. 617, 618]; that many times Mattis filed the returns after they had been signed [Rep. Tr. p. 619]; that he never at any time entered into any discussion with Hoffman, Mattis, his father or mother, as to any improper reduction or alteration of the receipts or income or any understanding to increase the expenses [Rep. Tr. p. 621]; that he did not keep the books from 1946 until 1949 after he had returned from the service, then the only book he kept was the hotel rental book for his father; that he never made any false entries in any of the books [Rep. Tr. pp. 621, 622]; he denied that he had ever suggested to Mattis that the gross receipts be cut \$10,000.00 [Rep. Tr. p. 623].

That at times he discussed with Mattis as to what deductions might be made for construction purposes, repairs, electrical signs, and with reference to the Neon

sign costing \$614.91, he said that Mattis himself suggested they make that deduction and if the Government did not allow it, they would capitalize it [Rep. Tr. pp. 641, 642]. That there was a discussion about an item of \$500.00 deducted for traveling expenses; that Mattis suggested that inasmuch as he, Gus, had to travel from store to store picking up receipts, going to the bank, he had a right to charge these travel expenses, and he did; that it was Mattis' suggestion [Rep. Tr. pp. 642, 643]; that with reference to construction costs he discussed that with Mattis; he had to completely rewire the stores because of a suggestion of the electrical inspector of the City of San Pedro [Rep. Tr. pp. 644, 645].

In closing, we want to pass comment upon the statement that Gus attempted to bribe Agent Wilbur. The facts are that Wilbur, who had become quite friendly with Gus, and who admitted on cross-examination that Gus had been more than cooperative, had furnished him records, had shown him boxes of invoices, had gone with him to the different stores. The day came when Wilbur, according to Gus, wanted to know if Gus had an attorney to represent him [Rep. Tr. p. 635], and Gus said he didn't know why he needed an attorney; that they were not afraid of the audit. Again Wilbur asked him if he didn't have an attorney. Gus said he didn't think he needed one; that his books were fair. Wilbur suggested if Gus had an attorney, "I perhaps can go talk to him" [Rep. Tr. p. 636]. Gus was puzzled as to what Wilbur wanted, and told Wilbur, "I don't understand what you mean. You are continually asking me if I have someone to represent me and I have persisted in saying that I didn't." He then wrote a figure on the top of a liquor case and asked Wilbur, "Is that what you want?" [Rep. Tr. pp. 636, 637.]

It is significant in this case that Wilbur did not rush to his office. It was a day or two before he made any report of this transaction, and Gus was never arrested and charged with an attempt to bribe an officer. I think we can assume that if the Government thought there was any merit in this at all, Gus would have been promptly arrested. Honest Government officials would have been alert to arrest an attempted briber, and at once. This whole case sounds as though they were trying to entrap these people. This conduct almost proves it.

The Applicable Law.

We respectfully direct the Court's attention to the case of *Sorrells v. United States*, 287 U. S. 435 at 444, 445, 77 L. Ed. 413, where the subject of entrapment is fully treated. We again call the Court's attention to the case of *Lufty v. United States*, only recently decided by this Court on the subject of entrapment, 198 F. 2d 761. (See also, *Sam Yick v. United States* (C. C. A. 9), 240 Fed. 60.)

There were two sets of facts in the Papadakis case, and the jury should have been properly instructed upon the subject of entrapment. It was for them to determine the fact under proper guidance of the Court. Our instructions proffered and heretofore referred to in the opening brief, were appropriate and should have been given.

Wherefore the appellant, Gus Papadakis, respectfully prays that the judgment of the Court below be reversed.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Appellant C. N. (Gus) Papadakis.

No. 13773

United States
Court of Appeals
for the Ninth Circuit.

HOWARD BEST,

Appellant,

VS.

HENRY A. POWIS, JEANNETTE M. REYN-
OLDS, as Administratrix With the Will
Annexed of the Estate of HARRY V. REYN-
OLDS, Substituted in the Place and Stead of
HARRY V. REYNOLDS and A. E.
TIERNEY,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

MAY 21 1953

WILLIAM J. O'NEILL

No. 13773

United States
Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GEORGE R. MAURY,
435 A. G. Bartlett Bldg.,
215 West Seventh St.,
Los Angeles 14, Calif.

For Appellee ~~A. E. Tierney~~: *Henry A. Powis*

J. E. SIMPSON,
MANLEY C. DAVIDSON,
433 S. Spring St., Room 842,
Los Angeles 13, Calif.

For appellee A.E. Tierney
ROWLAND M. BUTLER,
1301 Wilshire Blvd.,
Los Angeles 17, Calif.

For Appellee Jeanette M. Reynolds, etc.:

ELMER J. WALTHER,
621 S. Spring St., Suite 400,
Los Angeles 14, Calif.



United States District Court, Southern District of
California, Central Division

No. 13,583-T Civil

HOWARD BEST,

Plaintiff,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS, Substituted in the Place and Stead of HARRY V. REYNOLDS, and A. E. TIERNEY,

Defendants.

SECOND AMENDED COMPLAINT FOR
DAMAGES FOR FRAUD AND DECEIT

After leave of Court first had and obtained, plaintiff files this, his Second Amended Complaint, and complains and alleges:

1. Plaintiff is a citizen of the State of Utah. Henry A. Powis is a citizen of the State of California. Harry V. Reynolds, at the time of the commencement of this action, was a citizen of the State of California, has since deceased, and by stipulation and order Jeannette M. Reynolds as Administratrix with the Will Annexed of the Estate of Harry V. Reynolds has been substituted as a party defendant in the place and stead of Harry V. Reynolds; said Jeannette M. Reynolds is a citizen of the State

of California, and the Estate of Harry V. Reynolds, deceased, is pending in the Superior Court of [2*] the State of California, in and for the County of Los Angeles. A. E. Tierney is a citizen of the State of California.

2. The amount in controversy in this action exclusive of interest and costs exceeds the sum of \$3,000.00.

3. At all times herein mentioned:

(a) The Reypo Corporation was a corporation organized and existing under the laws of the State of California, having its principal place of business in the County of Los Angeles, State of California.

(b) Each original defendant herein was a director of said corporation and during the year 1947 and all thereof the living defendants and said Reynolds collectively constituted the entire Board of Directors of said corporation.

(c) Defendant Henry A. Powis was president of said corporation.

(d) Harry V. Reynolds, now deceased, was vice president of said corporation.

(e) To and including February 16, 1948, defendant A. E. Tierney was secretary of said corporation.

4. At various times during the four months preceding June 17, 1947, in the County of Los Angeles, State of California, the living defendants and said

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Reynolds, for the purpose of inducing plaintiff to purchase shares of the Reypo Corporation, orally represented to plaintiff that said corporation had obtained a permit from the Corporation Commissioner of the State of California authorizing it to sell and issue its shares for cash to plaintiff and others; that said permit would expire on June 17, 1947; and that if plaintiff desired to purchase shares of said corporation he must pay the full purchase price in cash on or before said date.

5. During said period the Reypo Corporation did in fact hold a permit issued by the Commissioner of Corporations of the State of California on or about December 17, 1946, which authorized said corporation to sell and issue an aggregate of not to exceed 47,810 of its shares at par for cash to members of the general public, but only [3] upon condition that all payments for said shares, less certain authorized selling expense, be delivered to and held as an escrow by an approved depository pending the further order of said Commissioner. No such further order has ever been made limiting or affecting said condition. Such permit, by its terms, terminated and expired on June 17, 1947.

6. On or about June 17, 1947, the living defendants and said Reynolds caused the Reypo Corporation to sell to plaintiff 10,000 shares of the stock of said corporation of the par value of \$10,000.00 and to accept and receive from plaintiff the sum of \$10,000.00 therefor. The living defendants and said Reynolds did not deliver, or cause the Reypo Cor-

poration to deliver, said \$10,000.00 or any part thereof to the depository designated by the said Commissioner of Corporations pursuant to such permit of December 17, 1946, but, on the contrary, caused said corporation to use and expend the same during the months of June, July, and August, 1947, to pay for current operations and to meet current obligations of said corporation.

7. In so doing, the living defendants and said Reynolds concealed and suppressed from plaintiff the condition imposed by the terms of said permit of December 17, 1946, as hereinabove alleged, and the fact that said sale of June 17, 1947, was in violation of such condition; and plaintiff purchased said shares in good faith, relying upon the representations made to him as aforesaid and upon the honesty and integrity of the living defendants and said Reynolds, and in the belief that such sale was valid and proper under the terms of said permit.

8. As a subterfuge and scheme and in order to avoid the disclosure in the records of the Reypo Corporation of a sale in violation of the condition imposed as aforesaid in the permit of December 17, 1946, the living defendants and said Reynolds, at the time of said sale to plaintiff, withheld issuing a share certificate reflecting his ownership of 10,000 shares of the Reypo Corporation, [4] and instead delivered to him a document purporting to be the promissory note of said corporation in the sum of \$10,000.00 providing for payment after thirty days with interest at 6% per annum and caused the

Reypo Corporation to reflect said sale to plaintiff on its records as a loan by plaintiff to said corporation upon the terms of said purported promissory note.

9. In so doing, it was the purpose and intent of the living defendants and said Reynolds that said purported promissory note should not constitute a valid or enforceable obligation of said corporation; and in delivering it to plaintiff as aforesaid, the living defendants and said Reynolds explained to him that there would be some delay in issuing a share certificate reflecting his ownership of 10,000 shares of the stock of the Reypo Corporation, that the purported promissory note was delivered to him to serve as a receipt for the \$10,000.00 paid as aforesaid until a share certificate was issued to him, and that when such a certificate should be issued plaintiff would be expected to surrender and cancel said purported promissory note in return therefor without at any time demanding any interest or principal payment thereunder.

10. Plaintiff accepted said purported promissory note in good faith, without knowing that the living defendants and said Reynolds were using it as a subterfuge and scheme as aforesaid, and in the belief that the delay in issuing a share certificate to him was due to some technical corporate requirement with which plaintiff was unfamiliar. At the time of said sale plaintiff had recently become a resident of the State of California and had no knowledge of the Corporate Securities Act of said

State, the regulations promulgated thereunder, or the requirements in California concerning the issuance of a certificate reflecting stock ownership in a corporation.

11. As a further part of said subterfuge and scheme, and for the purpose alleged in paragraph 8 hereof, the living defendants and said Reynolds in June, 1947, caused the Reypo Corporation to apply to [5] said Commissioner of Corporations for a new permit authorizing it to sell and issue its shares to certain named persons including plaintiff. Pursuant to such application, said Commissioner of Corporations issued to the Reypo Corporation a permit authorizing it to sell and issue to said persons an aggregate of not to exceed 40,000 of its shares, but required that any sale or issuance of shares thereunder be made at par for cash in such manner that said corporation would net the full amount of the selling price of such shares.

12. Subsequently, on or about December 23, 1947, the living defendants and said Reynolds caused the Reypo Corporation to issue to plaintiff its share certificate No. 63 reflecting ownership in plaintiff of 10,000 shares of the stock of said corporation and, as the sole consideration therefor, demanded and received from plaintiff the return and cancellation of the purported promissory note executed as aforesaid.

13. In so doing, the living defendants and said

Reynolds suppressed and concealed from plaintiff, and until September, 1951, he was unaware of the fact of such application for a new permit and the existence, terms and conditions of said permit of September 4, 1947, and particularly the fact that a permit had been obtained after said sale of shares to plaintiff which affected said sale and which required that any sale or issuance of shares pursuant to such permit be made at par for cash in such manner that Reypo Corporation would net the full amount of the selling price of said shares. In accepting said share certificate and returning and cancelling said purported promissory note, plaintiff acted in good faith, in reliance upon the honesty and integrity of the living defendants and said Reynolds, and in the belief that said action on his part was entirely proper and valid.

14. As a further part of the subterfuge and scheme hereinabove alleged, and for the purpose alleged in paragraph 8 hereof, the living defendants and said Reynolds concurrently with the issuance of [6] said share certificate on or about December 23, 1947, caused the Reypo Corporation to make appropriate entries in its corporate records purporting to show (1) payment in full of the obligation represented by said promissory note; (2) the occurrence, at that time, of a sale to plaintiff of 10,000 shares at par for cash; and (3) the receipt by said corporation, at that time, of the full purchase price of \$10,000.00 for said shares.

15. In making and engaging in the actions, rep-

resentations, suppressions, concealments, subterfuges, and schemes alleged in paragraphs 4 to 14 inclusive, of this Second Amended Complaint, it was the purpose and intent of the living defendants and said Reynolds to defraud plaintiff by obtaining from him on or before June 17, 1947, the sum of \$10,000.00 as the purchase price of 10,000 shares of the stock of the Reypo Corporation and by issuing to him a share certificate therefor, well knowing that said sale and issuance of shares was void and of no legal force or effect because, as hereinabove set forth, they were not made in accordance with the terms and conditions of any permit held by the Reypo Corporation. In so doing, the living defendants and said Reynolds, and each of them, acted with full knowledge of the terms and conditions of said permit of December 17, 1946, and since September 4, 1947, with full knowledge of the terms and conditions of the permit issued on said date.

16. At all times herein mentioned until September, 1951, plaintiff was wholly unaware of the fraud and deception practiced on him by the living defendants and said Reynolds, as hereinabove set forth, or of the invalidity of said sale and issuance to him of 10,000 shares of the stock of the Reypo Corporation. Plaintiff first learned of such fraud, deceit and invalidity under the following circumstances:

In July of 1947 plaintiff was appointed and actively entered upon his duties as sales representative of the Reypo Corporation for [7] the entire

territory of the State of California. During the course of his duties in such position, he necessarily had to and did travel continuously around and about the State of California, and a great portion of his time was spent in so travelling. During this period he had no access and no right to access to the books and records either of account or of the internal structure of the Reypo Corporation. During the Fall of the year 1947 the plaintiff, due to production difficulties encountered by the Reypo Corporation (which was in the business of manufacturing small sets of precision machine tools, such as drill presses, etc.), spent his daily work time in the factory of the corporation and performed manual labor in actual production work at the plant of said corporation. During this time also he had no access and no right of access to the books and records of the corporation. The stock was issued to him as aforesaid on or about December 23, 1947. After the completion of his production work in the said factory and after a return to normal production, he again resumed his position and duties as sales representative in California and again his business and work time was consumed in being outside of the plant and outside of the office of the corporation.

Upon January 6, 1948, at a regular meeting of the stockholders of the corporation, the plaintiff was personally present and was elected a director of said corporation. At said time and thereafter he retained his position as sales representative and, pursuant to the duties of said position, continued

to travel and to be outside of the office of the corporation during his said work and business time.

From January 6 to and including the 16th day of February, 1948, the plaintiff did not ever see any of the minutes of the corporation other than certain minutes of the stockholders meeting of January 6, 1948, which were signed by him as Acting Secretary, after having been prepared in his absence by some person now unknown to plaintiff.

That the Bylaws of the Reypo Corporation provided for regular [8] meetings of the directors on the fifteenth days of each calendar month. That upon the 15th day of January, 1948, no quorum appeared at the scheduled regular meeting of the Board of Directors for that month and the plaintiff so certified in the minute book of the corporation. That upon the 16th day of February, 1948, the plaintiff was duly elected and qualified as secretary-treasurer of said corporation and continued to hold said office thereafter.

That as such secretary-treasurer of the corporation, plaintiff was entitled to custody of all of the books and records of the corporation but, in fact, said books and records were kept at the office of the corporation and the plaintiff did not ever see those books, records and documents of the corporation pertaining to the application for said permit to issue stock filed in the Summer of 1947 nor the said permit to issue stock which was issued upon September 4, 1947, as aforesaid, and did not in fact know of the terms of said permit, nor of the whereabouts of said documents.

That plaintiff was, during all of this period, attempting to sell the products of the corporation, and was generally outside its office, and his duties as secretary-treasurer, which consisted of slight ministerial assistance to the active management of the corporation, required only a very small part of his time, and he at no time saw any of the aforesaid records and did not know of their whereabouts or of their existence. Plaintiff is informed and believes and therefore alleges that he was elected a director of the corporation and became an appointed secretary-treasurer thereof, among others, for the reason that he would thereby be sought to be charged with the knowledge of the corporate affairs to such an extent that the living defendants and said Reynolds might be exculpated from liability by such constructive knowledge, and that they actually concealed from plaintiff the facts herein alleged with reference to the issuance of said stock to plaintiff and that the same did not comply with the said permit to issue stock of September, 1947. [9]

Thereafter during the months from January, 1948, to and including November, 1948, the aforesaid situation existed, i.e., plaintiff was a director and secretary-treasurer of said corporation and at the same time was sales representative and engaged outside of the office of the corporation in doing his best to promote sales and to put said corporation upon its feet. Plaintiff had learned of the precarious financial condition of the corporation during or about December of 1947 and would not then have invested money, and believed he had bought such

stock in June of 1947, and plaintiff spent his best efforts and all of his working and business time in an attempt to restore said corporation to a sound financial position and paid no attention whatsoever to his own personal rights, or to the conditions surrounding the issuance of said stock, or the granting of said permit.

During the months of January to and including November, 1948, as aforesaid, the following meetings of the board of directors were held, at which plaintiff was present and at which only the following things, matters and proceedings were, in general, discussed:

February 16, 1948, regular meeting, plaintiff elected secretary-treasurer, and general discussion was held of the condition of the business.

March 15, 1948, regular meeting, during which a discussion was held concerning the inadequacy of quarters at 1233 Lincoln Blvd., Santa Monica, Calif., and new quarters were decided upon.

May 20, 1948, special meeting, during which the condition of the company was stated to the board of directors as being very precarious and general discussions were held concerning financing and the conduct of the business in the future.

July 15, 1948, regular meeting, during which discussion was had only as to the bad financial shape of the company and plans were considered to get more money into the company, if possible, and for the general management of the company. [10]

September 30, 1948, special meeting of stockholders for the purpose of establishing the present and

future policies of the corporation and to discuss and determine the advisability of offering for sale the complete development, including engineering patterns, prototypes, etc., of the production of the corporation, etc.

October 6, 1948, reconvened stockholders meeting for the further discussion of previous matters set forth at the prior meeting and to receive the report of the committee appointed by the stockholders at that meeting to investigate solutions for the company's situation and "Section 11."

October 11, 1948, reconvened meeting of the shareholders of September 30 and October 6, and a discussion of the possible course of bankruptcy.

November 2, 1948, special meeting of the Board of Directors wherein the president of the corporation was authorized either to sell all of the assets of the corporation to Marsden Associates or if unable to do so, to file a voluntary petition in bankruptcy.

November 15, 1948, regular meeting of the board of directors, at which time it was resolved that Howard Best, as secretary of the corporation (plaintiff herein) should be authorized to file a voluntary petition in bankruptcy in the above-entitled court.

That at no time during any of said meetings were the facts surrounding the issuance of plaintiff's stock ever mentioned, and plaintiff is informed and believes that this was a part of a purposeful concealment whereby plaintiff was prevented by the living defendants and said Reynolds from learning said facts.

That about said 15th day of November, 1948, for the first time, plaintiff took actual possession of all of the books, records and documents of and pertaining to said corporation and handed them to the attorney for the corporation for the purpose of preparing a voluntary petition in bankruptcy.

That thereafter and on or about the 18th day of November, 1948, [11] the said Reypo Corporation did file its certain voluntary petition in bankruptcy in this court and was thereupon adjudicated a bankrupt, in bankruptcy matter numbered 46697 in the office of the clerk of this court.

That thereupon a receiver was appointed and thereafter a trustee was appointed. That immediately upon the appointment of said receiver, all of the books, records and documents of and pertaining to said corporation were handed to said receiver who thereafter had complete custody thereof, and thereafter said books, records and documents were handed to the trustee in bankruptcy. Said trustee in bankruptcy retained possession thereof until August, 1951, when, after completion of the entire bankruptcy proceedings with reference to said corporation, they were returned to plaintiff as secretary of said corporation. Plaintiff at no time hereinabove mentioned even suspected that his said stock had been issued to him in any way in violation of the terms of said permit of September 4, 1947, and did not have actual knowledge thereof until September, 1951, as hereinafter set forth.

In September, 1951, he contacted his present attorney of record to determine whether, under Cali-

fornia law, corporate directors owed any duty to prospective purchasers of shares in a corporation to disclose fully to them the inadequate financial condition of the corporation before making any sale of shares to them and, if so, whether under the facts and circumstances related by him to said attorney there was any breach of such duty on the part of the living defendants and said Reynolds which would give rise to a cause of action on his part against them; said attorney thereupon made an investigation of the affairs and records of the Reypo Corporation and, upon ascertaining the terms and conditions of said permits of December 17, 1946, and September 4, 1947, also examined the files and records of the California Commissioner of Corporations relating to said corporation; at the conclusion of such investigation and examination, said [12] attorney informed plaintiff, and plaintiff then learned for the first time, of the terms and conditions of said permits, of the requirements and provisions of the California Corporate Securities Act and the regulations promulgated thereunder, of the invalidity thereunder of said sale and issuance of shares to him, and of the fraud and deceit practiced upon him by the living defendants and said Reynolds, as aforesaid.

That, as aforesaid, plaintiff first obtained actual custody and possession of said books and records for a short period of time in November, 1948, and has commenced this action within three years thereafter.

17. The actual value of that with which plaintiff parted is the sum of \$10,000.00 paid by him for shares of stock in the Reypo Corporation as aforesaid. Plaintiff received nothing of value from the foregoing transactions, or any of them, and was therefore damaged in the premises in the sum of \$10,000.00.

Wherefore, plaintiff prays for judgment against the living defendants and Jeannette M. Reynolds as Administratrix with the Will Annexed of the Estate of Harry V. Reynolds, substituted in the place and stead of Harry V. Reynolds, and each of them, in the sum of \$10,000.00 together with legal interest thereon from and after June 17, 1947; for his costs herein incurred; and for such other and further relief as may be just and proper.

/s/ GEORGE R. MAURY,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 28, 1952. [13]

[Title of District Court and Cause.]

MOTION TO DISMISS SECOND AMENDED
COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

Defendant Jeannette M. Reynolds, as Administratrix With the Will Annexed of the Estate of Harry V. Reynolds, substituted in the place and

stead of Harry V. Reynolds, deceased, moves to dismiss the above-entitled action and, in lieu thereof, for a summary judgment in favor of defendants and against plaintiff, upon the following grounds:

1. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

2. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted in that it appears therefrom that, if plaintiff ever had a cause of action against this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 338, Subdivision 1, providing a three-year statute of limitations in an action upon a liability created by statute other than a penalty or [15] forfeiture.

3. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted, in that it appears therefrom that, if plaintiff ever had a cause of action against this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 338, Subdivision 4, providing a three-year statute of limitations in actions for relief upon the ground of fraud.

4. Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted, in that it appears therefrom that, if plaintiff ever had a cause of action against

this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 359, providing a three-year statute of limitations in actions against directors of a corporation to enforce a liability created by law.

5, Because the Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted, in that it appears therefrom that, if plaintiff ever had a cause of action against this defendant, it is barred by the Statute of Limitations, to wit, California Code of Civil Procedure, Section 339, Subdivision 1, providing a two-year statute of limitations in an action upon a contract, obligation or liability not founded upon an instrument of writing.

6. Because it appears from the face of the Second Amended Complaint that Reypo Corporation is an indispensable necessary party to the full and final adjudication of this controversy, and it has not been made a party hereto.

7. That plaintiff's alleged cause of action is barred by laches.

Dated: September 22, 1952.

/s/ ELMER J. WALTHER,
Attorney for Defendant Jeannette M. Reynolds, as
Admx. w/w/a of the Estate of Harry V. Reynolds,
Deceased. [16]

Notice of Hearing

To: George R. Maury, Esquire, 435 Bartlett Building, 215 West Seventh Street, Los Angeles 14, California, Attorney for Plaintiff:

Please Take Notice, that the undersigned will bring the Motion to Dismiss Second Amended Complaint herein on for hearing before the above-entitled Court in the courtroom of the Honorable Ernest A. Tobin, Judge Presiding, Second Floor, United States Courthouse and Post Office Building, Los Angeles, California, on the thirteenth day of October, 1952, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

This Motion will be based upon Points and Authorities filed herewith, the Affidavits of Manley C. Davidson, Henry A. Powis, and A. E. Tierney filed with and in support of Motions of Henry A. Powis and A. E. Tierney to Dismiss the Demand for Admission of Facts and Genuineness of Documents filed by defendants Henry A. Powis and A. E. Tierney and the Reply of plaintiff thereto, and the records, files and pleadings now on file in said action.

Dated: September 22, 1952.

/s/ ELMER J. WALTHER,

Attorney for Defendant Jeannette M. Reynolds, as
Administratrix With Will Annexed of the
Estate of Harry V. Reynolds, Decreased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 24, 1952. [17]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS HENRY A.
POWIS AND A. E. TIERNEY TO DISMISS
SECOND AMENDED COMPLAINT

Henry A. Powis and A. E. Tierney, defendants in the above-entitled action, move to dismiss the second amended complaint and said action, or in the alternative for a summary judgment for them upon the grounds that these moving defendants are entitled to a judgment in their favor as a matter of law.

Said motion will be made upon the grounds hereinafter stated and these moving defendants will rely on the affidavits of Manley C. Davidson, Henry A. Powis and A. E. Tierney filed herein and incorporated as exhibits herein, the pleadings on file herein, the demand for admission of facts and genuineness of documents and the response to said demand made by the plaintiff herein, the points and authorities filed by the defendants herein in support of their motion to dismiss the first amended complaint, and the oral argument in support thereof, together with the points and authorities served and filed in [18] support of this motion:

1. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted.

2. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears there-

from that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of limitations, to wit, California Code of Civil Procedure, § 338, subdivision 1, providing a three-year statute of limitations in an action upon a liability created by statute other than a penalty or forfeiture.

3. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears therefrom that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of limitations, to wit, California Code of Civil Procedure, § 338, subdivision 4, providing a three-year statute of limitations in actions for relief upon the ground of fraud.

4. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears therefrom that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of limitations, to wit, California Code of Civil Procedure, § 359, providing a three-year statute of limitations in actions against directors of a corporation to enforce a liability created by law.

5. Because the second amended complaint fails to state a claim against these defendants upon which relief can be granted, in that it appears therefrom that if plaintiff ever had a cause of action against these defendants, it is barred by the statute of

limitations, to wit, California Code of Civil Procedure, § 339, subdivision 1, providing a two-year statute of limitations in an action upon a contract, obligation or liability not founded upon an instrument in [19] writing.

6. Because it appears from the face of the second amended complaint that Reypo Corporation is an indispensable and necessary party to the full and final adjudication of this controversy, and it has not been made a party hereto.

7. That the second amended complaint does not allege facts sufficient to constitute a cause of action against these moving defendants.

8. That plaintiff's alleged cause of action and claim for relief is barred by laches, in that it appears that the plaintiff knew, or in the exercise of reasonable diligence should have known or discovered, the facts upon which his said cause of action is predicated for more than three years prior to the filing of the complaint herein.

Dated: September 22, 1952.

J. E. SIMPSON, and

MANLEY C. DAVIDSON,

By /s/ J. E. SIMPSON,

Attorneys for Henry A.
Powis, Defendant.

/s/ ROWLAND M. BUTLER,

Attorney for Defendant A. E.
Tierney.

Notice of Hearing

To George R. Maury, 435 Bartlett Building, 215 W.
7th Street, Los Angeles 14, California, Attorney
for Plaintiff:

Please Take Notice, that the undersigned will bring the Motion to Dismiss Second Amended Complaint herein on for hearing before the above-entitled court in the courtroom of the Honorable Ernest A. Tolin, Judge Presiding, Second Floor, United States Courthouse and [20] Post Office Building, Los Angeles, California, on the 13th day of October, 1952, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard.

Dated: September 22, 1952.

J. E. SIMPSON, and

MANLEY C. DAVIDSON,

By /s/ J. E. SIMPSON,

Attorneys for Henry A.

Powis, Defendant.

/s/ ROWLAND M. BUTLER,

Attorney for Defendant A. E.

Tierney.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1952. [21]

[Title of District Court and Cause.]

**AFFIDAVIT OF A. E. TIERNEY IN SUPPORT
OF MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT**

State of California,
County of Los Angeles—ss.

A. E. Tierney being first duly sworn on oath deposes and says: That at all times mentioned in plaintiff's Second Amended Complaint, up to and including December 23, 1947, affiant was the duly elected, qualified and acting Secretary and Director of Reypo Corporation; that during all of said time all of the books and records of said corporation including all applications for permits filed in the office of the Commissioner of Corporations of the State of California together with all permits issued by said Commissioner in response thereto were regularly kept in the corporate filing cabinets at the head office of said corporation and were available for inspection at all times by the officers, directors and stockholders of [23] said corporation; that as early as December 17, 1947, plaintiff assumed the duties of Treasurer of said corporation, took possession of the corporate ledgers and made entries therein; that at that time all of the corporate books and records above mentioned were kept in said corporate filing cabinets and were easily accessible to plaintiff; that on or about December 23, 1947, it was understood by all of the officers and directors of said corporation, including the plaintiff herein,

that affiant would and did immediately cease to act as Secretary and Director of said corporation and that plaintiff would and thereupon did assume the duties of such Secretary; that at that time affiant left the corporate minute books together with all of the other corporate books and records in said corporate filing cabinets and in the custody of the acting Secretary-Treasurer, to wit, the plaintiff herein; further your affiant sayeth not.

Dated: September 23, 1952.

/s/ A. E. TIERNEY.

Subscribed and sworn to before me this 23rd day of September, 1952.

/s/ RUTH P. McBEAN,

Notary Public in and for
Said County and State.

My Commission Expires May 27, 1953.

[Endorsed]: Filed September 25, 1952. [24]

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY A. POWIS IN
SUPPORT OF MOTION TO DISMISS

State of California,
County of Los Angeles—ss.

Henry A. Powis, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action;

That during all of the times mentioned in plaintiff's Second Amended Complaint on file herein, affiant was the President and a Director of Reypo Corporation, the corporation mentioned in plaintiff's said Second Amended Complaint;

That Article IX of the Bylaws of said Reypo Corporation provides that the Secretary shall keep, or cause to be kept a book of minutes at the principal office or such other place as the Board of Directors may order, of all meetings of Directors and shareholders, and further requires that the Secretary shall keep, or cause to be kept, at the principal office or the office of the corporation's transfer agent, a share register or duplicate share register, showing the [25] names of the shareholders and their addresses, and the number and classes of shares held by each, the number and dates of certificates issued for the same, and the number and date of cancellation of each certificate surrendered for cancellation. That Article XII of the Bylaws of said Reypo Corporation provides that:

“Certificates of stock shall be of such form and device as the Board of Directors may direct, and each certificate shall be signed by the President or a Vice-President, and the Secretary.”

That at all times mentioned in Plaintiff's Second Amended Complaint, the provisions of said Bylaws of said Reypo Corporation, as aforesaid, were in effect and were not amended, altered, changed or repealed.

That on June 10, 1947, at a special meeting of the Board of Directors of said Reypo Corporation,

resolutions were duly adopted by the Board of Directors of said corporation, whereby said Board of Directors resolved that it was for the best interests of said corporation to abandon its efforts to further sell shares of its stock to the general public under the Permit of December 17, 1946, issued to said corporation, and to authorize the Commissioner of Corporations to release all sums impounded under the terms of said permit, which amounted to the sum of \$2,200.00, and authorizing affiant, as President of the corporation, to file an application for an amended and supplemental Permit for permission to sell and issue an aggregate of not to exceed 40,000 of its shares, at par for cash, lawful money of the United States, and without selling expense attached thereto, to certain persons named in an exhibit submitted to said meeting; and whereby it was further resolved that upon issuance of said amended and supplemental permit by the Commissioner of Corporations of the State of California, pursuant to such application or any amendment thereof, the "President or Vice-President and the Secretary of this corporation be and they are authorized and instructed to issue and/or sell the shares of this [26] corporation authorized to be issued and/or sold by said Permit, for the consideration stated and in compliance with all of the terms and conditions of such Permit."

That said minutes of said special meeting, as aforesaid, were, on or about the 10th day of June, 1947, placed in the Minute Book of said corporation

and at all times thereafter remained in said Minute Book; that pursuant to said resolutions, as aforesaid, an application was filed with the Commissioner of Corporations of the State of California, and that on or about September 4, 1947, an Amended Permit was issued by the Department of Investment of the Division of Corporations of the State of California to said corporation, a true and correct copy of which was attached to the "Demand for Admission of Facts and Genuineness of Documents," filed herein, in Demand numbered X thereof, which is by this reference incorporated herein as though fully set forth at length herein.

That said Minute Book contains the minutes of a regular meeting of the Board of Directors of said corporation held on June 16, 1947, wherein it is stated that this affiant stated that a loan for \$10,000.00 could be negotiated with Howard Best, the plaintiff in this action, and the Directors authorized the execution of a note of said corporation to said Howard Best for \$10,000.00 with interest at six per cent. That said Minute Book contains minutes of the Board of Directors meeting of August 15, 1947, wherein it is stated that this affiant recited to the Directors that a \$10,00.00 note had been executed in favor of Howard Best, the plaintiff in this action, to evidence such loan. That said minutes of June 16, 1947, and August 15, 1947, were in the Minute Book of said corporation and remained therein at all times from and after the holding of said meetings.

That prior to June 17, 1947, the said Reypo Corporation delivered to the plaintiff in this action a

true and correct copy of the Permit issued to said corporation by the Department of Investment, [27] Division of Corporations of the State of California, dated December 17, 1946, and plaintiff herein, by his response to Demand for Admission of Facts and Genuineness of Documents, admits his receipt from said corporation of a copy of said Permit; that in delivering to said plaintiff a copy of said Permit, as aforesaid, prior to June 17, 1947, the defendants could not have, and did not, on or about June 17, 1947, or at any other time, conceal or suppress from plaintiff any of the conditions imposed by the terms of said Permit, as alleged in plaintiff's Second Amended Complaint.

That the original Amended Permit, issued on or about September 4, 1947, a copy of which is annexed to paragraph X of the defendants' Demand for Admission of Facts and Genuineness of Documents, together with a copy of the application therefor, was at all times from and after the receipt by said Reypo Corporation of such documents, placed in the corporate files of said Reypo Corporation, and remained in such files at the office of Reypo Corporation until the same were delivered to the Trustee in Bankruptcy, as mentioned in plaintiff's Second Amended Complaint, and were at all times available and accessible to all of the officers, Directors and stockholders of Reypo Corporation; that plaintiff, at all times from and after the date he was made a Director of Reypo Corporation and from and after the date he was elected as the Secretary-Treasurer of said corporation, had access to all of the books,

records and files of Reypo Corporation, including the original of said Amended Permit of September 4, 1947, together with the copy of the application therefor, and at all of said times knew the place at which all of the books and records and files of said corporation were kept; that neither this affiant nor any of the other defendants hid or concealed said original Amended Permit of September 4, 1947, as aforesaid, or the copy of the application therefor, from plaintiff or any other person whomsoever, but in truth and in fact said original Amended Permit, as aforesaid, and the copy of the application therefor, were regularly filed in the corporate files of said [28] corporation and maintained there at all times from the receipt by said corporation to the time they were delivered to the Trustee in Bankruptcy as aforesaid, together with all of the other records and documents of said corporation; that at no time did affiant suppress or conceal from plaintiff the fact of such application for such Permit, or the existence, terms and conditions of said Permit of September 4, 1947; nor did this affiant conceal from plaintiff any of the facts in connection with the application for said Permit which was issued on September 4, 1947, or the fact of the issuance of said Permit of September 4, 1947.

That all of the entries in the corporate records mentioned in Paragraph 14 of plaintiff's Second Amended Complaint were made by plaintiff.

That neither this affiant nor any of the defendants had any purpose or intent to defraud plaintiff,

as alleged in paragraph 15 of said Second Amended Complaint, or at all.

That in connection with plaintiff's allegations appearing at page eight, lines twenty-three to twenty-nine, inclusive, that plaintiff "was elected a Director of the corporation and appointed Secretary-Treasurer thereof, among others, for the reason that he would thereby be sought to be charged with the knowledge of the corporate affairs to such an extent that the living defendants and said Reynolds might be exculpated from liability by such constructive knowledge," this affiant avers that he had no knowledge of any rule of law to the effect that the election and appointment of a Director and Secretary-Treasurer of the corporation imposed such constructive knowledge until affiant was so informed by his attorneys in this action, after the filing of this action.

That the Minute Book of said Reypo Corporation contains the minutes of a meeting of the Board of Directors of said corporation held on May 20, 1948, wherein it is stated, among other things, as follows:

"Mr. Best brought up the subject of disposing of [29] additional stock in order to manufacture Model Master Metalworker, which, he felt, offered better market possibilities than any of the other Reypo products and that if possible we should discuss disposing of Reypo stock through a promoter. In discussing this, it was pointed out that there was not enough Reypo stock available to interest a promoter and that in any event, it would be necessary

to obtain a new permit from the Corporation Commissioner to dispose of stock in this manner. Mr. Powis pointed out that there was not enough money available, from the sale of subject stock, as had been authorized, to even tool up for the Model Master Metalworker. The cost of tooling up this machine being estimated at \$25,000.00 or \$30,000.00, and expressed himself as being in favor of doing nothing further with the Metalworker until the Company was in position to invest that much money in tooling and patterns.”

That the Mr. Best referred to in said minutes is the plaintiff in this action and said plaintiff acted as Secretary of said meeting and subscribed his name to such minutes.

That at all times from and after February 16, 1948, the date plaintiff was elected the Secretary-Treasurer of said corporation, said plaintiff had the custody of the Minute Book of said Reypo Corporation. That following election of plaintiff as treasurer of said corporation on February 16, 1948, said plaintiff was authorized to and did sign checks drawn by said corporation together with affiant.

That said plaintiff did, during the month of August, 1948, as Secretary of Reypo Corporation, sign stock certificate # 67, evidencing the ownership of 1,500 shares of Reypo Corporation in one John Bruecker, which stock certificate was, during said month [30] of August, 1948, delivered to said John Bruecker.

/s/ HENRY A. POWIS.

Subscribed and sworn to before me this 24th day of September, 1952.

[Seal] /s/ J. E. SIMPSON,
Notary Public in and for
Said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1952. [31]

[Title of District Court and Cause.]

AFFIDAVIT OF MANLEY C. DAVIDSON
IN SUPPORT OF MOTION TO DISMISS

State of California,
County of Los Angeles—ss.

Manley C. Davidson, being first duly sworn, deposes and says:

That he is one of the attorneys of record for the defendant, Henry A. Powis, in the above-entitled matter.

That heretofore the defendants Henry A. Powis and A. E. Tierney did serve upon plaintiff herein, through his attorneys of record herein, a written Demand for Admission of Facts and Genuineness of Documents, which for purposes of brevity will hereafter be referred to as "Defendants' Demand," and that in response thereto plaintiff did serve upon said defendants, through their attorneys of record herein, a written Response to Demand for Admission of Facts and Genuineness of Documents, which

for purposes of brevity will hereafter be referred to as "Plaintiff's Response."

That Defendants' Demand numbered I stated as follows: [33]

"I.

"That the following is a true and correct photostatic copy of the original Permit issued to Reypo Corporation by the Department of Investment, Division of Corporations of the State of California on December 17, 1946, and is the same Permit that is referred to in paragraph 4 of plaintiff's First Amended Complaint."

That there then followed a true and correct photostatic copy of the original Permit issued to Reypo Corporation by the Department of Investment, Division of Corporations of the State of California on December 17, 1946, which was attached to said Defendants' Demand and which is by this reference incorporated herein as though fully set forth at length herein. That said Permit provides, among other things as follows:

"3(b). That none of the shares authorized by paragraph 2 hereof shall be sold or offered for sale unless and until said applicant shall have first selected a depository, and said depository shall have been first approved in writing by the Commissioner of Corporations.

"That until the further order of said Commissioner the full amount of each payment on account of subscriptions to said shares shall be paid to said applicant, and that each payment, less the selling expense authorized herein and actually paid, and a

statement showing the full name and address and the number of shares subscribed for by each subscriber, shall immediately be delivered by the applicant to and held as an escrow by said depository pending the further order of said Commissioner.

“That there shall be deposited, subject to release in whole or in part in the discretion of said Commissioner, and upon such terms and conditions as he may deem advisable, with said depository from bona fide subscriptions, the net sum of [34] \$38,248.00 cash, lawful money of the United States, on or before the 17th day of June, 1947, provided, however, that said date may be extended by said Commissioner upon such terms and conditions as he may prescribe.”

That Plaintiff's Response to said demand numbered I, as aforesaid, was: “Yes.”

That Defendants' Demand numbered II was:

“That prior to June 17, 1947, plaintiff received from Reypo Corporation a copy of the Permit referred to and set forth in Paragraph I hereof.”

And Plaintiff's Response thereto was: “Yes.”

That Defendants' Demand numbered III was as follows:

“That on or about June 17, 1947, plaintiff, Howard Best, delivered to Reypo Corporation the sum of \$4,580.15, in the form of two checks, one for the sum of \$1,621.46, and the other for the sum of \$2,958.69.”

That Plaintiff's Response thereto is: “Yes.”

That Defendants' Demand numbered IV is as follows:

“That on or about June 17, 1947, Reypo Corporation made, executed and delivered to the plaintiff a receipt for the said sum of \$4,580.15 referred to in Paragraph III hereof, which said receipt is in words and figures, as follows:

“That the receipt is:

“6/17/47.

“Received from Howard T. Best, 4580.15—for which Reypo Corp. note will be immediately issued for 30 days—with interest at 6%.

“REYPO CORPORATION,

“H. A. POWIS,

“Pres.” [35]

That Plaintiff’s Response to Defendants’ Demand numbered IV is as follows: “Yes.”

That Defendants’ Demand numbered V is as follows:

“That on or about June 25, 1947, plaintiff delivered to Reypo Corporation the sum of \$5,419.85.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered XXXV is as follows:

“That at the times in June, 1947, that Plaintiff delivered to Reypo Corporation the moneys aggregating the sum of \$10,000.00 as set forth in Paragraphs III, IV and V hereof, Plaintiff knew that said moneys were to be used by Reypo Corporation for corporate purposes and would not be impounded.”

That Plaintiff’s Response thereto is in part as follows:

“Plaintiff knew that the moneys were to be used by Reypo Corporation for corporate purposes * * *”

That Defendants’ Demand numbered VI is as follows:

“That on or about June 25, 1947, Reypo Corporation made, executed and delivered to the plaintiff its promissory note, of which the following is a true and correct photostatic copy:”

That the photostatic copy of said promissory note is in words and figures as follows, to wit:

“\$10,000.00.....June 17, 1947

“Thirty days after date without grace we promise to pay to the order of Howard T. Best Ten Thousand & 00/100 Dollars, for Value received, with interest from date at the rate of 6 per cent per annum until paid. Principal and interest payable in Lawful Money of the United States, at Santa Monica, California, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the [36] Court may adjudge reasonable as Attorney’s fees in said suit.

“REYPO CORPORATION,

“A. E. TIERNEY,

“Secretary.

“No. 10.”

That Defendants’ Demand numbered VII is as follows:

“That the said promissory note, described in Paragraph VI hereof, was delivered to plaintiff in return for the sum of \$10,000.00 delivered by plain-

tiff to said Reypo Corporation at the times and in the amounts referred to in Paragraphs III and V hereof.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered VIII is as follows:

“That the promissory note set forth in Paragraph VI hereof is the document referred to in paragraph 7 of Plaintiff’s First Amended Complaint as a ‘document purporting to be the promissory note of said corporation in the sum of \$10,000.00,’ and is the same document referred to by Plaintiff in paragraph 8 of Plaintiff’s First Amended Complaint as the purported promissory note delivered to Plaintiff to serve as a receipt.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered IX is as follows:

“That the said promissory note hereinabove referred to and set forth in Paragraph VI hereof, was in the possession of Plaintiff until some time between December 23 and December 30, 1947.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered XI is as follows:

“That on or about the following dates the Plaintiff, Howard Best, loaned to Reypo Corporation the following sums of money:

“December 9, 1947.....	\$ 650.00
“December 11, 1947.....	1500.00
“February 2	800.00
“February 2	300.00”

That [37] Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered XII is as follows:

“That the following is a true and correct copy of a portion of the Loans payable records books of account, Account No. 6.5 of Reypo Corporation:”

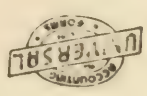
That a photostatic copy of said account No. 6.5 of Reypo Corporation was attached to said Defendants’ Demand and is herewith attached to this [38] affidavit.

ACCOUNT NO. 65

Some payable

SHEET NO.

DATE	DESCRIPTION	POSTING REF.	CHARGES	CREDITS	OR ON CR	BALANCE
Mar 10	H. A. Paine.	R-2		8000		
Mar 12	H. A. Paine	R-5		1900		
Mar 14	H. A. Paine	R-6		2900		
Mar 16	H. A. Paine	R-6		1900		
Mar 18	H. A. Paine	R-7		2900		
Mar 20	H. A. Paine	R-7		1900		
Mar 22	H. A. Paine	R-8		2900		
Mar 24	H. A. Paine	R-9		3900		
Mar 26	H. A. Paine	R-9		12146		
Mar 28	H. A. Paine	R-9		295867		
Mar 30	H. A. Paine	R-9		541985	Cr	30000
Mar 31	H. A. Paine	R-10	14000		Cr	16000
Apr 1	H. A. Paine	R-10		2900		
Apr 3	H. A. Paine	R-11		1900		
Apr 5	H. A. Paine	R-12		1900		
Apr 7	H. A. Paine	R-13		2000		
Apr 9	H. A. Paine	R-13		1900		
Apr 11	H. A. Paine	R-14		500		
Apr 13	H. A. Paine	R-14		750		
Apr 15	H. A. Paine	R-14		200		
Apr 17	H. A. Paine	R-14		100		
Apr 19	H. A. Paine	R-14		29178	Cr	25784178
Apr 21	H. A. Paine	R-15		650		
Apr 23	H. A. Paine	R-15		1500		
Apr 25	H. A. Paine	R-15		300		
Apr 27	H. A. Paine	R-15		400		
Apr 29	H. A. Paine	R-15		500		
Apr 31	H. A. Paine	R-15		300		
May 1	H. A. Paine	R-15		300		
May 3	H. A. Paine	R-15		300		
May 5	H. A. Paine	R-15		300		
May 7	H. A. Paine	R-15		300		
May 9	H. A. Paine	R-15		300		
May 11	H. A. Paine	R-15		300		
May 13	H. A. Paine	R-15		300		
May 15	H. A. Paine	R-15		300		
May 17	H. A. Paine	R-15		300		
May 19	H. A. Paine	R-15		300		
May 21	H. A. Paine	R-15		300		
May 23	H. A. Paine	R-15		300		
May 25	H. A. Paine	R-15		300		
May 27	H. A. Paine	R-15		300		
May 29	H. A. Paine	R-15		300		
May 31	H. A. Paine	R-15		300		
Jun 1	H. A. Paine	R-15		300		
Jun 3	H. A. Paine	R-15		300		
Jun 5	H. A. Paine	R-15		300		
Jun 7	H. A. Paine	R-15		300		
Jun 9	H. A. Paine	R-15		300		
Jun 11	H. A. Paine	R-15		300		
Jun 13	H. A. Paine	R-15		300		
Jun 15	H. A. Paine	R-15		300		
Jun 17	H. A. Paine	R-15		300		
Jun 19	H. A. Paine	R-15		300		
Jun 21	H. A. Paine	R-15		300		
Jun 23	H. A. Paine	R-15		300		
Jun 25	H. A. Paine	R-15		300		
Jun 27	H. A. Paine	R-15		300		
Jun 29	H. A. Paine	R-15		300		
Jun 31	H. A. Paine	R-15		300		
Jul 1	H. A. Paine	R-15		300		
Jul 3	H. A. Paine	R-15		300		
Jul 5	H. A. Paine	R-15		300		
Jul 7	H. A. Paine	R-15		300		
Jul 9	H. A. Paine	R-15		300		
Jul 11	H. A. Paine	R-15		300		
Jul 13	H. A. Paine	R-15		300		
Jul 15	H. A. Paine	R-15		300		
Jul 17	H. A. Paine	R-15		300		
Jul 19	H. A. Paine	R-15		300		
Jul 21	H. A. Paine	R-15		300		
Jul 23	H. A. Paine	R-15		300		
Jul 25	H. A. Paine	R-15		300		
Jul 27	H. A. Paine	R-15		300		
Jul 29	H. A. Paine	R-15		300		
Jul 31	H. A. Paine	R-15		300		
Aug 1	H. A. Paine	R-15		300		
Aug 3	H. A. Paine	R-15		300		
Aug 5	H. A. Paine	R-15		300		
Aug 7	H. A. Paine	R-15		300		
Aug 9	H. A. Paine	R-15		300		
Aug 11	H. A. Paine	R-15		300		
Aug 13	H. A. Paine	R-15		300		
Aug 15	H. A. Paine	R-15		300		
Aug 17	H. A. Paine	R-15		300		
Aug 19	H. A. Paine	R-15		300		
Aug 21	H. A. Paine	R-15		300		
Aug 23	H. A. Paine	R-15		300		
Aug 25	H. A. Paine	R-15		300		
Aug 27	H. A. Paine	R-15		300		
Aug 29	H. A. Paine	R-15		300		
Aug 31	H. A. Paine	R-15		300		
Sep 1	H. A. Paine	R-15		300		
Sep 3	H. A. Paine	R-15		300		
Sep 5	H. A. Paine	R-15		300		
Sep 7	H. A. Paine	R-15		300		
Sep 9	H. A. Paine	R-15		300		
Sep 11	H. A. Paine	R-15		300		
Sep 13	H. A. Paine	R-15		300		
Sep 15	H. A. Paine	R-15		300		
Sep 17	H. A. Paine	R-15		300		
Sep 19	H. A. Paine	R-15		300		
Sep 21	H. A. Paine	R-15		300		
Sep 23	H. A. Paine	R-15		300		
Sep 25	H. A. Paine	R-15		300		
Sep 27	H. A. Paine	R-15		300		
Sep 29	H. A. Paine	R-15		300		
Sep 31	H. A. Paine	R-15		300		
Oct 1	H. A. Paine	R-15		300		
Oct 3	H. A. Paine	R-15		300		
Oct 5	H. A. Paine	R-15		300		
Oct 7	H. A. Paine	R-15		300		
Oct 9	H. A. Paine	R-15		300		
Oct 11	H. A. Paine	R-15		300		
Oct 13	H. A. Paine	R-15		300		
Oct 15	H. A. Paine	R-15		300		
Oct 17	H. A. Paine	R-15		300		
Oct 19	H. A. Paine	R-15		300		
Oct 21	H. A. Paine	R-15		300		
Oct 23	H. A. Paine	R-15		300		
Oct 25	H. A. Paine	R-15		300		
Oct 27	H. A. Paine	R-15		300		
Oct 29	H. A. Paine	R-15		300		
Oct 31	H. A. Paine	R-15		300		
Nov 1	H. A. Paine	R-15		300		
Nov 3	H. A. Paine	R-15		300		
Nov 5	H. A. Paine	R-15		300		
Nov 7	H. A. Paine	R-15		300		
Nov 9	H. A. Paine	R-15		300		
Nov 11	H. A. Paine	R-15		300		
Nov 13	H. A. Paine	R-15		300		
Nov 15	H. A. Paine	R-15		300		
Nov 17	H. A. Paine	R-15		300		
Nov 19	H. A. Paine	R-15		300		
Nov 21	H. A. Paine	R-15		300		
Nov 23	H. A. Paine	R-15		300		
Nov 25	H. A. Paine	R-15		300		
Nov 27	H. A. Paine	R-15		300		
Nov 29	H. A. Paine	R-15		300		
Nov 31	H. A. Paine	R-15		300		
Dec 1	H. A. Paine	R-15		300		
Dec 3	H. A. Paine	R-15		300		
Dec 5	H. A. Paine	R-15		300		
Dec 7	H. A. Paine	R-15		300		
Dec 9	H. A. Paine	R-15		300		
Dec 11	H. A. Paine	R-15		300		
Dec 13	H. A. Paine	R-15		300		
Dec 15	H. A. Paine	R-15		300		
Dec 17	H. A. Paine	R-15		300		
Dec 19	H. A. Paine	R-15		300		
Dec 21	H. A. Paine	R-15		300		
Dec 23	H. A. Paine	R-15		300		
Dec 25	H. A. Paine	R-15		300		
Dec 27	H. A. Paine	R-15		300		
Dec 29	H. A. Paine	R-15		300		
Dec 31	H. A. Paine	R-15		300		



That Plaintiff's Response to said Defendants' Demand number XII is as follows: "Yes."

That Defendants' Demand number XIII is as follows:

"That the entries made in the Loans Payable accounts set forth in Paragraph XII hereof, beginning with the entry dated Dec. 9, 1947, and ending with the last entry dated Jan. 8, 1948, were written by and are in the handwriting of the Plaintiff."

That Plaintiff's Response to said demand is as follows: "Yes."

That Defendants' Demand number XIV is as follows:

"That between December 23 and December 30, 1947, Reypro Corporation made, executed and delivered to the Plaintiff, Howard Best, its check in the sum of \$10,000.00; that Plaintiff endorsed said check by writing on the back thereof the language hereinafter set forth, and that the said check and the said endorsement are in words and figures as follows": (There is attached hereto a photostatic copy of said check.)

(There is attached hereto a photostatic copy of the endorsement appearing on the reverse of said check.) [39]

That Plaintiff's Response to Defendants' Demand numbered XIV is as follows: "Yes."

That Defendants' Demand numbered XV is as follows:

"That after endorsing said check with the words, 'Pay to Reypo Corp. Purchase price in full for Reypo Stock Cert. # 63, Howard Best,' Plaintiff delivered said check to Reypo Corporation, together with a letter dated December 23, 1947, addressed to Reypo Corporation, and signed by Plaintiff, Howard Best, of which the following is a true and correct photostatic copy:

"December 23, 1947.

"Reypo Corporation,
"1233 Lincoln Blvd.,
"Santa Monica, Calif.

"Attention: Mr. H. A. Powis.

"Dear Mr. Powis:

"I acknowledge receipt of your check # 1076, dated December 23, 1947, in the amount of \$10,000.00 in payment of your note of June 17, 1947, for \$10,000.00.

"Referring to our recent discussions regarding an investment in Reypo Corporation, I hand you, herewith, the above-mentioned check endorsed in favor of the Reypo Corporation, in full payment for 10,000 shares of Common Stock of Reypo Corporation.

"I acknowledge receipt of Certificate # 63 for

10,000 shares of Reypo Corporation Stock dated December 23, 1947.

“Yours very truly,

“/s/ HOWARD BEST.” [40]

That Defendants’ Demand number XVI is as follows:

“That concurrently with the delivery to Reypo Corporation of the said check for \$10,000.00 duly endorsed by Plaintiff and the said letter dated December 23, 1947, both of which are hereinabove set forth, Plaintiff delivered to Reypo Corporation the promissory note set forth and described in Paragraph VI hereof.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand number XVII is as follows:

“That at or about the time that Plaintiff delivered the said check for \$10,000.00, the said promissory note for \$10,000.00 and the said letter dated December 23, 1947, which are hereinabove set forth and described, the Plaintiff received from Reypo Corporation its Certificate No. 63 for 10,000 shares of Reypo Corporation stock, dated December 23, 1947.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand number XXI is as follows:

“That Plaintiff became associated with Reypo Corporation as sales representative about June,

July or August, 1947, and continued that association until some time in the year 1948.”

That Plaintiff’s Response thereto is: “Yes.”

That Defendants’ Demand numbered XXV is as follows:

“That the following is a true and correct photostatic copy of Sheet No. D-36, Record of Checks Drawn in December, 1947, by Reypo Corporation, the original of which sheet is contained in the books of accounts and records of Reypo [41] Corporation:”

3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32
35467	17911	1228	19300	4064	127753	32340	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470	1470
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That Plaintiff's Response to Defendants' Demand numbered XXV is as follows: "Yes."

That Defendants' Demand numbered XXVI is as follows:

"That the entries on said sheet or Account D-36, set forth in Paragraph XXV hereof, beginning with the entry showing check drawn in favor of Barker Bros. Grinding, under date of the 17th of December and ending with the last entry on said sheet showing check for \$10,000.00 drawn in favor of Howard Best in payment of 'Notes Pay June 17, 1947,' are in the handwriting of and were made by Plaintiff."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered XXVII is as follows:

"That the last entry on said Sheet D-36 for \$10,000 paid to Howard Best is a book entry made by Plaintiff to record the issuance to Plaintiff of check No. 1076 for \$10,000, dated December 23, 1947, and more particularly described and set forth in paragraph XIV hereof."

That Plaintiff's Response thereto is: "Yes."

That Defendants' Demand numbered XXVIII is as follows:

"That the following is a true and correct photostatic copy of Sheet No. R-15 of the Record of Cash Received for the month of December, 1947, as contained in the original books of account of Reypo Corporation": [44]

[illegible]

That Plaintiff's Response to Defendants' Demand XXVIII is as follows:

"The record set forth in this demand is a true and correct record. It does not, however, reflect cash received but merely cash entries made."

That Defendants' Demand number XXIX is as follows:

"That all of the entries on said Sheet No. R-15 set forth in Paragraph XXVIII hereof, beginning with the entry for the sum of \$158.95 under date of December 17, 1947, showing money received from H. W. Mills & Co., and ending with the last entry for \$10,000 under date of December 23, from Howard Best, are in the handwriting of and were made by Plaintiff."

That Plaintiff's Response thereto is as follows:

"This is an ambiguous demand. The record therein discussed is in the handwriting of the plaintiff."

That the permit of the Commissioner of Corporations issued to Reypo Corporation under date of December 17, 1946, as aforesaid, required and provided that the sale and issuance of any of its securities referred to therein would be "at par, for cash, lawful money of the United States."

/s/ MANLEY C. DAVIDSON.

Subscribed and sworn to before me this 18th day of September, 1952.

[Seal] /s/ ROSE BERGER,
Notary Public in and for
Said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1952. [46]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION ON MOTION
TO DISMISS SECOND AMENDED COM-
PLAINT

The Second Amended Complaint is vulnerable to the motion to dismiss.

It is framed as an action for damages for Fraud and Deceit. The fraud is alleged to have occurred at the time of an alleged sale of corporate shares on or about June 17, 1947, and at the time of actual issuance of the stock later in the same year. Defendants' contention that the Statute of Limitations bars the action is good. Plaintiff pleads that he became a Director of the corporation January 6, 1948. On February 16th of the same year he was duly elected and qualified as Secretary-Treasurer and continued to hold said office thereafter. While holding these positions, he attended several meetings of [48] the Board during which the financial difficulties of the corporation were openly discussed.

The fraud allegedly perpetrated upon Plaintiff would have been discovered by any reasonably prudent person having the active part in the corporation's life which Plaintiff pleads was practiced by him.

The California Corporation Code 3001 and 3004 codifies the old law to the effect that a director has a right to inspect the books of a corporation. The duties of a director require him to be familiar with the affairs of the corporation, including the area of corporate activity wherein this Plaintiff claims he had been defrauded. See *Vertex Investment Company v. Schwabacher*, 57 Cal. App. 2d, 406.

There is no doubt that Code of Civil Procedure 338 contains the applicable statute of limitations. Whether subdivisions 1 or 4 apply here is not material because both prescribe a three-year limitation.

As this action was commenced more than three years after the alleged fraudulent acts, Plaintiff's only chance of overcoming the bar of the Statute lies in either showing a discovery of the fraud at a date after its commission and within three years prior to filing his complaint, or in alleging some facts which would toll the Statute. The facts relied upon to show a late discovery include those above noted from which the Court must find the exercise of due diligence, in the light of all pleaded facts, would have brought actual "discovery" to Plaintiff. "* * * 'Discovery,' within the meaning of the section, is deemed to take place when the Plaintiff in the exercise of due diligence should have learned the facts. * * *" (*Vertex Investment Company v.*

Schwabacher, 57 Cal. App. 2d, [49] 406, at 415, supra.) In *Merchants' Ice & Cold Storage Co. v. Globe Brewing Company*, 78 Cal. App. 2d, 618, the court, in discussing this section (338 C.C.P.), said, at Page 623:

“* * * to bring himself within it, the plaintiff is required to establish facts not only showing that he was not negligent in failing to make an earlier discovery, but also that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. * * *”

Further, the court, in discussing “presumptive knowledge,” said, at Page 624:

“* * * if the facts are presumptively within his knowledge, he will be deemed to have actual knowledge of their existence. * * *”

Plaintiff in the instant case had access to and duties concerning all the records and files recording stock transactions. Constructive or “presumptive” knowledge could not be more clear than on the pleaded facts. Upon the facts of the case, the Plaintiff did not act with due diligence or, as seems more likely, he actually discovered the facts and decided for some undisclosed reason not to act thereon. He had three years within which to seek redress but the right, lost by inaction, cannot be revived sufficiently to survive the plea of the Statute of Limitations.

There is nothing in the present record to suggest that the Statute was tolled. Because the possibility of some “tolling” situation remains, the Second Amended Complaint is dismissed but the action is

not. Plaintiff is allowed twenty days to amend. Unless a third amended [50] complaint be on file by the close of business January 23, 1953, the Court will dismiss the action.

The Motion for Summary Judgment is denied as moot.

The Motion to Strike is ordered off calendar.

Defendants will prepare an order of dismissal of the Second Amended Complaint.

Dated: This 31st day of December, 1952.

/s/ ERNEST A. TOLIN,

United States District Judge.

[Endorsed]: Filed December 31, 1952. [51]

United States District Court, Southern District of
California, Central Division
No. 13,583-T Civil

HOWARD BEST,

Plaintiff,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS, Substituted in the Place and Stead of HARRY V. REYNOLDS, and A. E. TIERNEY,

Defendants.

ORDER OF DISMISSAL

This cause having been heard on the motions of the defendants to dismiss the Second Amended Com-

plaint in the above-entitled action, and having been argued and submitted for decision, and it appearing to the Court that the said Second Amended Complaint fails to state a claim against said defendants upon which relief can be granted in that the alleged cause of action is barred by the statute of limitations, it is

Ordered, that the Second Amended Complaint herein be dismissed, and that plaintiff be granted up to and including [52] January 23, 1953, in which to file an amended complaint, and if plaintiff shall fail to do so the said action shall be dismissed with costs to said defendants.

Dated: January 7, 1953.

/s/ ERNEST A. TOLIN,

United States District Judge.

Approved as to form as provided under Rule 7.

Dated: January 6, 1953.

/s/ GEORGE R. MAURY,

Attorney for Plaintiff.

[Endorsed]: Filed January 7, 1953.

Judgment docketed and entered January 8, [53] 1953.

In the United States District Court in and for the
Southern District of California, Central Division

No. 13,583-T Civil

HOWARD BEST,

Plaintiff,

vs.

HENRY A. POWIS, et al.,

Defendants.

ORDER DISMISSING ACTION

Whereas, the Court made its Order dismissing the Second Amended Complaint and granting permission to file a Third Amended Complaint on or before January 23, 1953; and

Whereas, plaintiff has not filed such Third Amended Complaint within the time prescribed by the Court's Order, and has not petitioned for an enlargement of time within which to do so:

The Court Does Now Dismiss This Action.

Costs taxed at \$48.73 favor Defendant Powis and \$20.00 favor Defendant Reynolds.

Dated: This 27th day of January, 1953.

/s/ ERNEST A. TOLIN,

United States District Judge.

[Endorsed]: Filed January 28, 1953.

Judgment docketed and entered January 29, [54]
1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73-B

Notice Is Hereby Given that Howard Best, the plaintiff in the above-entitled action, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain Order Dismissing Action dated the 27th day of January, 1953, and docketed and entered on the 29th day of January, 1953, and from all thereof, and from all intermediary adverse rulings of the Court.

Dated: February 26, 1953.

/s/ GEORGE R. MAURY,
Attorney for Plaintiff.

[Endorsed]: Filed February 27, 1953. [55]

[Title of District Court and Cause.]

DOCKET ENTRIES

Basis of Action: Complaint for Damages (\$10,000)
for Fraud and Deceit in Sale of Corporate
Securities in Violation of California Corporate
Securities Act. [61]

* * *

10/24/51—Fld. Compl. for Dmgs. for Fraud & De-
ceit in Sale of Corp. Securities. Issd.
Sums. JS-5.

* * *

11/14/51—Fld. Mot. & Not. of Mot. to Dism., retble.
12/10/51 at 10 am.m. with Pts. & Auths.
thereof. Fld. Mot. for More Definite

Stmt. Fld. Dft. Reynolds Demand for Security for Costs. Placed Mot. for More Definite Stmt. on Cal. 12/10/51 for Hrg. & Notif. Counsel by phone.

11/28/51—Fld. Mot. & Not. of Mot. to Dism. of Dft. A. E. Tierney, retble. 12/10/51 at 10 a.m. with Pts. & Auths. thereon. Fld. Mot. & Not. of Mot. for More Definite Stmt. of Dft. A. E. Tierney, retble. 12/10/51 at 10 a.m. with Pts. & Auths. thereon. Fld. Demand for Security for Costs of Dft. A. E. Tierney. Fld. Mot. & Not. of Mot. of Dft. Henry A. Powis for More Definite Stmt., Retble. 12/10/51 at 10 a.m., & fld. Pts. & Auths. in Sup. thereof. Fld. Mot. & Not. of Mot. to Dism. of Dft. Henry A. Powis, retble. 12/10/51 at 10 a.m. & fld. Pts. & Auths. in Sup. thereof.

* * *

1/ 5/52—Fld. Plf's. 1st Amend. Compl.

1/ 7/52—Ent. Proc. on Hrg. Dfts. Sep. Mots. to Dism. for Failure to State a Claim, etc. Ent. Ord. that inasmuch as Plf. has Fld. an Amend. Complaint, [62] said Mots. are Ord. Off. Cal. Ent. fur. Ord. Dfts. have 30 Days fr. Today's Date in which to Plead to said Amend. Compl.

* * *

6/30/52—Fld. notice of rulg. on defts. mot. to dism. 1st amend. compl. htf. taken under subm. on 3/17/52 which is granted. Mld. copies to counsel.

7/ 1/52—Fld. for pltf. Howard Best request for leave to file second amended compl.

7/ 7/52—Fld. ord. dismissing 1st amended compl. & that pltf. be grntd. 30 days to file an amended compl. & if pltf. fail to do so then defts. have & recover costs of [63] suit.

* * *

7/28/52—Fld. second amended compl.

7/31/52—Fld. Stip. & Ord. thereon that Defts. hv. to 9/25/52 in wh. to ans. Pltf's. 2nd Amend. Compl.

9/24/52—Fld. Deft. Reynolds not. of mot. ret'ble 10/13/52, 10:00 a.m. mot. to dismiss second & complt. & mot. for sum. jmt. Fld. pts. & auths. suppt.

9/25/52—Fld. defts. proposed summ. judgment. Fld. defts. proposed findings of fact and concls. of law on granting of mot. for sum. jmt. Fld. not. of mot. of defts. Henry A. Powis and A. E. Tierney, retble. 10/13/52, 10 a.m., mot. to strike, pts. and auths. thereon. Fld. not. of mot. of defts Powis and Tirney, retble. 10/13/52, to dismiss second am. complt. Fld. pts. and auths. support mot. to dismiss second am. complt. Fld. affid. Manley C. Davidson suppt. mot. to dismiss. Fld. affid. Henry A. Powis suppt. mot. to dismiss. Fld. affid. A. E. Tierney suppt. mot. to dismiss. [64]

* * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain the original Second Amended Complaint for Damages for Fraud and Deceit; Motion to Dismiss Second Amended Complaint and Motion for Summary Judgment; Motion of Defendants Henry A. Powis, et al., to Dismiss Second Amended Complaint; Separate Affidavits of A. E. Tierney, Henry A. Powis and Manley C. Davidson in Support of Motion to Dismiss; Memorandum of Decision on Motion to Dismiss Second Amended Complaint; Order of Dismissal; Order Dismissing Action; Notice of Appeal and Designations of Record on Appeal and a full, true and correct copy of the Docket Entries which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of March, A.D. 1953.

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13773. United States Court of Appeals for the Ninth Circuit. Howard Best, Appellant, vs. Henry A. Powis, Jeannette M. Reynolds, as Administratrix With the Will Annexed of the Estate of Harry V. Reynolds, Substituted in the Place and Stead of Harry V. Reynolds and A. E. Tierney, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 24, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13773

HOWARD BEST,

Appellant,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS, as Administratrix With the Will Annexed of the Estate of HARRY V. REYNOLDS Substituted in the Place and Stead of HARRY V. REYNOLDS and A. E. TIERNEY,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

The appellant relies on one point only: The Lower Court misstated the law and erred in holding that

the cause of action stated in Plaintiff's Second Amended Complaint was barred by the Statute of Limitations.

Designation of Record

Appellant hereby designates the following as all of the record which is material to the consideration of the appeal:

(1) The Second Amended Complaint of Plaintiff;

(2) The Motion of Jeannette M. Reynolds to dismiss the Second Amended Complaint;

(3) The Motion of Defendants Henry A. Powis and A. E. Tierney to Dismiss Second Amended Complaint;

(4) The Order of Dismissal on granting of motion to dismiss;

(5) Order dismissing action; and

(6) Memorandum of decision on motion to dismiss Second Amended Complaint.

Dated: April 14, 1953.

/s/ GEORGE R. MAURY,
Attorney for Appellant.

Also Notice of Appeal, Clerk's Certificate.

[Endorsed]: Filed April 15, 1953.

No. 13773

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD BEST,

Appellant,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS, as Administratrix with the Will Annexed of the Estate of HARRY V. REYNOLDS, substituted in the place and stead of HARRY V. REYNOLDS, and A. E. TIERNEY,

Appellees.

APPELLANT'S OPENING BRIEF.

GEORGE R. MAURY,

3460 Wilshire Boulevard,
Los Angeles 5, California,

Attorney for Appellant.

FILED

JUL 29 1954

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No. 13773

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD BEST,

Appellant,

vs.

HENRY A. POWIS, JEANNETTE M. REYNOLDS, as Administratrix with the Will Annexed of the Estate of HARRY V. REYNOLDS, substituted in the place and stead of HARRY V. REYNOLDS, and A. E. TIERNEY,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction of District Court.

I.

The District Court had jurisdiction below under the provisions of 28 U. S. Code, Section 1332 which provides:

“Diversity of Citizenship; amount in controversy.
(a) The District Courts shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum in value of \$3,000.00 exclusive of interest and cost and is between: [sub. 1] Citizens of different states * * *.”

It appears from the Second Amended Complaint [R. 3] that:

1. Plaintiff is a citizen of the State of Utah.
2. All of the defendants are citizens of the State of California.
3. The amount in controversy [R. 4] exclusive of interest and costs exceeds the sum of \$3,000.00. The amount actually involved is \$10,000.00 [R. 5, 7, 17].

Statement of Appellate Jurisdiction Under Rule 20(b).

Jurisdiction of this Court is grounded on United States Code, Title 28, Section 1291 as follows:

“Final decisions of District Courts. The Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * *, except where a direct review may be had in the Supreme Court.”

The appeal herein is from a final order dismissing the action [R. 60]. The order dismissing was docketed and entered on 29 January, 1953 [R. 59]. The notice of appeal was filed 27 February, 1953 [R. 60].

Abstract of the Case.

The case sounds in fraud for the selling to the plaintiff of corporate stock in violation of the California Corporate Securities Law, the “Blue Sky Law” (Cal. Corp. Code, Secs. 25000 to 26000, incl.). The action was dismissed by the Court below wholly upon the ground “that the alleged cause of action is barred by the Statute of Limitations” [R. 58].

Specifications of Error.

I.

The Court erred in holding that the plaintiff actually discovered the fraud within three years, after the fraud was committed, contrary to the direct allegations of the complaint.

II.

The Court erred in making a finding of fact contrary to the pleaded facts, wherein the Court stated [R. 56]:

“Upon the facts of the case, the plaintiff did not act with due diligence or, *as seems more likely, he actually discovered the facts and decided for some undisclosed reason not to act thereon.*” (Emphasis added.)

III.

The Court erred in holding that the plaintiff was constructively charged with knowledge of facts constituting the fraud before his actual discovery thereof.

ARGUMENT.

Summary.

Point I. Since the Court below decided the case entirely upon the allegations of the Second Amended Complaint [R. 57-58] it had no power to find facts contrary to those allegations [R. 54-57].

Authorities:

A motion to dismiss a complaint for insufficiency supplants the general demurrer and admits, for the purposes of the motion, all facts which are well pleaded, and the complaint must be construed in the light most favorable to the plaintiff.

Cohen v. United States (C. C. A. 8), 129 F. 2d 733;

Galbreath v. Metro Trust Co. (C. C. A. 10), 134 F. 2d 569;

Carroll v. Morrison Hotel Corp. (C. C. A. 7), 149 F. 2d 404;

Dennis v. Tonka Bay (C. C. A. 8), 151 F. 2d 411.

Point II. The bar of the Statute of Limitations was improperly applied in consideration of all of the facts pleaded by plaintiff.

Authorities:

Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 436-440, 159 P. 2d 958;

Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 Pac. 809;

Consol. R. & P. Co. v. Scarborough, 216 Cal. 698,
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Knapp v. Knapp, 15 Cal. 2d 237;

Sublette v. Tinney, 9 Cal. 423 (No Nat'l Reporter
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Johnson v. Ehgott, 1 Cal. 2d 136, 137 P. 2d 144;

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522;

Edwards v. Sergi, 137 Cal. App. 369, 30 P. 2d
541;

Smith v. Martin, 135 Cal. 247, 67 Pac. 779.

POINT I.

Under our Point I above we have urged that since the Court decided the case entirely upon the allegations of the Second Amended Complaint [R. 57-58] it had no power to find facts contrary to those allegations [R. 54-57]. The Memorandum of the Decision of the lower court on motion to dismiss Second Amended Complaint after discussing some of the pleadings etc. and after some discussion of the law, says: "Upon the facts of the case, the plaintiff did not act with due diligence or, as seems more likely, he actually discovered the fact and decided for some undisclosed reason not to act thereon" [R. 56]. Here the Court has made a statement, a finding of fact, at complete variance with the allegations of the complaint, *i. e.*, the Second Amended Complaint, herein referred to as the complaint for brevity. The lower court has lightly set aside every allegation in the complaint concerning the plaintiff's activities, and his stated reasons for not having discovered the fraud which had been practiced upon him within the prescribed three year period. We do not wish to belabor the Court with matter quoted from the record. However, plaintiff [R. 10] states: "That all times herein mentioned until September, 1951, plaintiff was wholly unaware of the fraud and deception practiced by the living defendants * * *, or of the invalidity of said sale and issuance to him of 10,000 shares of the stock. * * * Plaintiff first learned of such fraud, deceit and invalidity under the following circumstances."

Here follows a narration that plaintiff became sales representative of the company for California [R. 10-11]. He necessarily traveled continuously about the state and much of his time was spent in traveling. During this time he had no access and no right of access to the books [R. 11] (the stock was not issued to him until December 23, 1947); during the Fall of 1947, the plaintiff worked in the factory of the corporation [R. 11]. Thereafter he returned to his sales representative position, and again spent his time outside the plant and outside the office of the corporation. On January 6, 1948, he was elected a director [R. 11], *but still retained his position as sales representative and continued to travel* [R. 11-12]. He was outside the office during his work, and business time [R. 12]. Until the 16th of February, 1948, he never saw the minutes other than certain stockholders minutes of January 6, 1948 [R. 12]. The By-laws provided for monthly meetings [R. 12]. Upon 15 January, 1948, no quorum appeared for the directors meeting. On 16 February, 1948, plaintiff was elected and qualified as secretary-treasurer [R. 12]. Plaintiff was entitled to custody of all the books and records of the corporation thereafter but in fact said books and records were kept at the office of the corporation, and plaintiff did not ever see those books, records and documents of the corporation pertaining to the application for said permit to issue stock filed in the summer of 1947, nor the said permit to issue stock which was issued upon September 4, 1947; and did not in fact know of the terms of said permit nor of the

whereabouts of said documents [R. 12]. Generally during this period the plaintiff was outside the office of the corporation [R. 13]. His secretary-treasurer duties consisted of slight administerial assistance for the active management and required only a small part of his time [R. 13]. At no time did he see any of the records and did not know of their whereabouts or of their existence [R. 13]. The defendants actually concealed from the plaintiff the facts herein alleged with reference to the issuance of said stock to plaintiff and that the issuance of the same did not comply with said permit to issue stock dated September, 1947 [R. 13]. From January, 1948, to and including November, 1948, the situation continued to exist whereby plaintiff was a director secretary-treasurer *and at the same time was sales representative and engaged outside of the office of the corporation in doing his best to promote sales and to put said corporation back on its financial feet.* In December of 1947, plaintiff learned of the precarious financial condition of the corporation during that month [R. 13] and would not then have invested and believed that he had bought his stock in June of 1947 [R. 13-14].

Plaintiff spent his best efforts and all of his working and business time attempting to restore said corporation to a sound, financial position and paid no attention whatsoever to his own personal rights or to the condition surrounding the issuance of said stock or the granting of said permit.

The monthly meetings of the directors are set forth and the subject matter discussed at each meeting is set forth [R. 14-15].

It should be noted that on November 2, 1948, at a special meeting of the Board of Directors [R. 15] a resolution was passed wherein the *president* of the corporation was authorized either to sell all the assets of the corporation or to file a voluntary petition in bankruptcy [R. 15].

On November 15, 1948, at a regular meeting of the board it was resolved that Howard Best as *secretary* of the corporation should be authorized to file a voluntary petition in bankruptcy in the United States District Court.

At no time during any of said meetings were the facts surrounding the issuance of plaintiff's stock ever mentioned, and plaintiff believes that this was part of a purposeful concealment whereby plaintiff was prevented by the living defendants and said Reynolds from learning said facts.

On 15th of November, 1948, *for the first time*, plaintiff took actual possession of the books, records and documents of said corporation and handed them to the attorney for the corporation for the purposes of preparing a voluntary petition in bankruptcy. Petition in bankruptcy was filed. Receiver was appointed; a trustee was appointed. All the books, records and documents were handed to the

receiver [R. 16]. Trustee in bankruptcy retained possession thereof until August, 1951 [R. 16].

Thus from the foregoing (which the lower court should have accepted as true under the well established rules, it is, we submit, well pleaded that the plaintiff did *not* have actual knowledge of the facts surrounding the issuance of the permit to issue stock of September, 1947.

Yet the Court below has set all this aside, has paid no attention to it, and has stated that “or as seems more likely, he actually discovered the facts and decided for some undisclosed reason not to act thereon” [R. 56].

This ruling was made entirely upon the motion to dismiss and in the same memorandum decision the Court denied the motion for summary judgment as moot, and the motion to strike was ordered off calendar [R. 57].

The rule applicable is that a motion to dismiss a complaint for insufficiency supplants the common law and code pleading general demurrer and admits for the purposes of the motion the truth of all facts which are well pleaded, and the complaint must be construed in the light most favorable to the plaintiff. Upon this point we respectfully refer the Court to the cases listed above under our Point I and respectfully submit that the Court did not either consider as true all of the well pleaded facts or construe the complaint in the light most favorable to the plaintiff. This second concept, of course, shades over into our Point II.

POINT II.

Under this we have above cited a number of authorities.

The fraud alleged occurred in 1947. The final act consummating the fraud, in December, 1947, was the issuance and delivery to plaintiff of the certificate for 10,000 shares of stock. Antedating this for many months were the representations of the defendants from before 17 June, 1947, to induce plaintiff to part with his money. Before this also was the issuance of the *note* in June, and the June, 1947 application for the permit to issue stock—permit granted 4 September, 1947—and all ultimately ended by the issuance of the stock to the plaintiff for the cancellation of the note—NOT for cash as required by the permit.

The action was not commenced until October 24, 1951, three years and ten months after the actual consummation of the fraud alleged.

The lower court decided the case solely on the basis of the California Statute of Limitations.

California Code of Civil Procedure, Section 338, provides actions for fraud must be brought within three years of discovery of the “fact constituting the fraud.”

After three years, the time of discovery must be alleged and affirmatively proved by the plaintiff. With that proposition there is no argument. In this case in compliance of that requirement of the law, the complaint states many facts (some hereafter quoted), concerning the

reasons for plaintiff's failure to discover the issuance of the September, 1947 permit within the three years:

[R. 6]: “* * * the living defendants and said Reynolds concealed and suppressed from plaintiff the condition imposed by the terms of the permit of December 17, 1946, as hereinabove alleged, and the fact that said sale of June 17, 1947, was in violation of said condition.”

[R. 6]: “As a subterfuge and scheme and in order to avoid the disclosure in the records of the Reypo Corporation of a sale in violation of the condition imposed as aforesaid in the permit of December 17, 1946, the living defendants and said Reynolds at the time of said sale to plaintiff, withheld issuing a share of certificate reflecting his ownership of 10,000 shares of Reypo Corporation, and instead delivered him a document purporting to be the promissory note of said corporation in the sum of \$10,000.00, providing for payment after thirty days with interest at 6% per annum and caused the Reypo Corporation to reflect said sale to plaintiff on its records as a loan by plaintiff to said corporation upon the terms of said purported promissory note.”

[R. 7]: “Plaintiff accepted this purported promissory note in good faith, without knowing that the * * * defendants were using it as a subterfuge and scheme * * * and in the belief that the delay in issuing a share certificate to him was due to some technical corporate requirement with which plaintiff was unfamiliar. At the time of said sale plaintiff had recently become a resident of the State of California, and had no knowledge of the Corporate Securities Act of said state, the regulations promulgated thereunder or the requirements in Cali-

fornia concerning the issuance of a certificate reflecting stock ownership in a corporation.”

[R. 8]: “In June, the defendants caused the corporation to apply for a new permit [R. 8]. This was granted in September [R. 9, 10] and permitted only sales for *cash*.”

[R. 8]: “on or about December 23, 1947, the * * * defendants * * * caused the Corporation to issue to plaintiff its share certificate No. 63 reflecting ownership in plaintiff of 10,000 shares of stock of said corporation, and as the sole consideration therefore demanded and received from the plaintiff the return and cancellation of the purported promissory note executed as aforesaid.”

[R. 8-9]: “In so doing the living defendants and said Reynolds suppressed and concealed from plaintiff, and until September, 1951, he was unaware of the fact of such application for a new permit and the existence, terms and conditions of said permit of September 4, 1947, and particularly the fact that a permit had been obtained after said sale of shares to plaintiff which affected said sale and which required that any sale or issuance of shares pursuant to such permit be made at par for cash in such manner that Reypo Corporation would net the full amount of the selling price of said shares.”

Plaintiff recites that he first learned of such fraud, deceit and invalidity under the following circumstances: [R. 10 *et seq.*]. In July of 1947 plaintiff was appointed and actively entered upon his duties as sales representative of Reypo Corporation for the entire territory of the State of California. During the course of his duties in such position he necessarily had to and did

travel continuously, around and about the State of California and a great portion of his time was spent in so traveling. During this period he had no access and no right to the access to the books and records either of account or of the internal structure of the Reypo Corporation. During the Fall of the year 1947, the plaintiff, due to production difficulties encountered by the Reypo Corporation (which was in the business of manufacturing small sets of precision machine tools such as drill presses etc.) spent his daily work time in the factory of the Corporation and performed manual labor in actual production work in the plant of said corporation. During this time also he had no access and no right of access to the books and records of the corporation. The stock was issued to him as aforesaid on or about December 23, 1947. After the completion of his production work in said factory and after a return to normal production he again resumed his position and duties as sales representative in California and again his business and work time was consumed in being outside of the plant and outside of the office of the corporation.

Upon January 6, 1948, at a regular meeting of the stockholders of the corporation, the plaintiff was personally present and was elected a director of said corporation. At said time and thereafter he retained his position as sales representative and pursuant to the duties of said position continued to travel and to be outside of the office of the corporation during his said work and business time.

“From January 6, to and including the 16th day of February, 1948, the plaintiff did not ever see any of the minutes of the corporation other than certain

minutes of the stockholders meeting of January 6, 1948, which was signed by him as acting secretary, after having been prepared in his absence by some person now unknown to plaintiff.

“That the By-Laws of the Reypo Corporation provided for regular meetings of the directors on the 15th days of each calendar month. That upon the 15th day of January, 1948, no quorum appeared at the scheduled regular meeting of the board of directors for that month and the plaintiff so certified in the minute book of the corporation. That on the 16th day of February, 1948, the plaintiff was duly elected and qualified as secretary-treasurer of said corporation and continued to hold said office thereafter.

“That as such secretary-treasurer of the corporation plaintiff was entitled to custody of all the books and records of the corporation but in fact said books and records were kept at the office of the corporation and plaintiff did not ever see those books, records and documents of the corporation pertaining to the application for said permit, to issue stock filed in the summer of 1947, nor the said permit to issue stock which was issued upon September 4, 1947, and did not in fact know of the terms of said permit or of the whereabouts of said document.

“That plaintiff was during all of this period attempting to sell the products of the corporation and was generally outside its office and his duties as secretary-treasurer, which consisted of slight assistance to the active management of the corporation required only a very small part of his time, and he at no time saw any of the aforesaid records and did not know of their whereabouts or of their existence. Plaintiff is informed and believes and therefore

alleges that he was elected a director of the corporation and became an appointed secretary-treasurer thereof among the others for the reason that he would thereby be sought to be charged with the knowledge of the corporate affairs to such an extent that the living defendants and said Reynolds might be exculpated from liability by such constructive knowledge and that they actually concealed from plaintiff the facts herein alleged with reference to the issuance of said stock to plaintiff and that the same did not comply with the said permit to issue stock of September, 1947.

“Thereafter during the months from January to and including November, 1948, the aforesaid situation existed, *i. e.*, plaintiff was a director and secretary of said corporation and at the same time was sales representative and engaged outside of the office of the corporation in doing his best to promote sales and to put said corporation upon its feet. Plaintiff had learned of the precarious financial condition of the corporation during or about December, 1947, and would not then have invested money and believed he had bought such stock in June, 1947 and plaintiff spent his best efforts and all of his working and business time in an attempt to restore said corporation to a sound and financial position and paid no attention whatsoever to his own personal rights, or to the conditions surrounding the issuance of said stock or the granting of said permit.

“During the months of January to and including November, 1948, as aforesaid, the following meetings of the board of directors were held, at which plaintiff was present and at which only the following things, matters and proceedings were in general discussed.”

(Summarized not quoted):

February 16, 1948, regular meeting, plaintiff elected secretary-treasurer, and general discussion was held of the condition of the business.

March 15, 1948, regular meeting, during which a discussion was held concerning the inadequacy of quarters at 1233 Lincoln Blvd., Santa Monica, Calif., and new quarters were decided upon.

May 20, 1948, special meeting, during which the condition of the company was stated to the board of directors as being very precarious and general discussions were held concerning financing and the conduct of the business in the future.

July 15, 1948, regular meeting, during which discussion was had only as to the bad financial shape of the company and plans were considered to get more money into the company, if possible, and for the general management of the company [R. 10].

September 30, 1948, special meeting of stockholders for the purpose of establishing the present and future policies of the corporation and to discuss and determine the advisability of offering for sale the complete development, including engineering patterns, prototypes, etc., of the production of the corporation, etc.

October 6, 1948, reconvened stockholders meeting for the further discussion of previous matters set forth at the prior meeting and to receive the report of the committee appointed by the stockholders at that meeting to investigate solutions for the company's situation and "Section 11."

October 11, 1948, reconvened meeting of the shareholders of September 30 and October 6, and a discussion of the possible course of bankruptcy.

November 2, 1948, special meeting of the Board of Directors wherein the president of the corporation was authorized either to sell all of the assets of the corporation to Marsden Associates or if unable to do so, to file a voluntary petition in bankruptcy.

November 15, 1948, regular meeting of the board of directors, at which time it was resolved that Howard Best, as secretary of the corporation (plaintiff herein) should be authorized to file a voluntary petition of bankruptcy in the above-entitled court.

That at no time during any of said meetings were the facts surrounding the issuance of plaintiff's stock ever mentioned, and plaintiff is informed and believes that this was a part of a purposeful concealment whereby plaintiff was prevented by the living defendants and said Reynolds from learning said facts.

That about said 15th day of November, 1948, for the first time, plaintiff took actual possession of all of the books, records and documents of and pertaining to said corporation and handed them to the attorney for the corporation for the purpose of preparing a voluntary petition in bankruptcy.

That thereafter and on or about the 18th day of November, 1948 [R. 11], the said Reypo Corporation did file its certain voluntary petition in bankruptcy in this court and was thereupon adjudicated a bankrupt, in bankruptcy matter numbered 46697 in the office of the clerk of this court.

That thereupon a receiver was appointed and thereafter a trustee was appointed. That immediately upon the appointment of said receiver, all of the books, records and documents of and pertaining to said corporation were handed to said receiver who thereafter had complete custody thereof, and thereafter said books, records and documents were handed to the trustee in bankruptcy. Said trustee in bankruptcy retained possession thereof until August, 1951, when, after completion of the entire bankruptcy proceedings with reference to said corporation, they were returned to plaintiff as secretary of said corporation. Plaintiff at no time hereinabove mentioned even suspected that his said stock had been issued to him in any way in violation of the terms of said permit of September 4, 1947, and did not have actual knowledge thereof until September, 1951, as hereinafter set forth.

In September, 1951, he contacted his present attorney of record to determine whether, under California law, corporate directors owed any duty to prospective purchasers of shares in a corporation to disclose fully to them the inadequate financial condition of the corporation before making any sale of shares to them, and, if so, whether under the facts and circumstances related by him to said attorney there was any breach of such duty on the part of the living defendants and said Reynolds which would give rise to a cause of action on his part against them; said attorney thereupon made an investigation of the affairs and records of the Reypo Corporation and, upon ascertaining the terms and conditions of said permits of December 17, 1946, and September 4, 1947, also examined the files and records of the California Commissioner of Corporations relating to said corporation; at

the conclusion of such investigation and examination, said [R. 12] attorney informed plaintiff, and plaintiff then learned for the first time, of the terms and conditions of said permits, of the requirements and provisions of the California Corporate Securities Act and the regulations promulgated thereunder, of the invalidity thereunder of said sale and issuance of shares to him, and of the fraud and deceit practiced upon him by the living defendants and said Reynolds, as aforesaid.

That, as aforesaid, plaintiff first obtained actual custody and possession of said books and records for a short period of time in November, 1948, and has commenced this action within three years thereafter.

The question is, therefore, whether plaintiff was negligent in not discovering the fraud sooner.

This question has been exhaustively considered by the Supreme Court of California in 1945 in the case of *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 436-444, 159 P. 2d 958, as follows:

II. *Statute of Limitations.*

“Defendants contend that this action is barred by section 338 of the Code of Civil Procedure which provides a three-year period of limitations for commencement of: ‘An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.’ The conferences at which Greene is claimed to have made false representations were held in the latter part of 1935, and the transaction based thereon was completed in January, 1936. The present action, however, was not

commenced until June, 1941, more than five years after the alleged fraud took place.

“The provision tolling operation of the statute until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint. (See *Sublette v. Tinney* (1858), 9 Cal. 423; *Lady Washington C. Co. v. Wood*, 113 Cal. 482 [45 P. 809]; *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698 [16 P. 2d 268]; *Knapp v. Knapp*, 15 Cal. 2d 237, 242 [100 P. 2d 759].) Further, although negligence by the person defrauded is not a defense to a promptly brought action based upon intentional misrepresentation (see *Seeger v. Odell*, 18 Cal. 2d 409, 414 [115 P. 2d 977, 136 A. L. R. 1291]), the cases construing section 338, subdivision 4, *supra*, have held that plaintiff must affirmatively excuse his failure to discover the fraud within three years after it took place, by establishing facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. (See *Johnson v. Ehrgott*, 1 Cal. 2d 136, 137 [34 P. 2d 144]; *Original Min. & Mill. Co. v. Casad*, 210 Cal. 71, 74 [290 P. 456]; *Del Campo v. Camarillo*, 154 Cal. 647, 657 [98 P. 1049].)

“Defendants assert that in addition to these requirements plaintiff must show that he made a diligent inquiry to discover whether or not he had been defrauded, and they argue that plaintiff failed to prove that earlier inquiry would not have revealed the falsity of the alleged representations. It is not

in every case, however, that a person is barred after three years by failure to pursue an available means of discovering possible fraud. The statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: 'Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.' (Italics added.) Under this section it was held in *Tarke v. Bingham*, 123 Cal. 163 [55 P. 759], that the plaintiff was not barred by subdivision 4 of section 338 of the Code of Civil Procedure, since nothing had occurred 'to excite his suspicion, or to put him upon inquiry.' (123 Cal. at p. 166.) The court said: 'Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*' (Italics added.) Many other decisions have adopted this view. (See *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal. 2d 501, 511 [86 P. 2d 102]; *Original Min. & Mill. Co. v. Casad*, 210 Cal. 71, 76 [290 P. 456]; *Prewitt v. Sunnymead Orchard Co.*, 189 Cal. 723, 730 [209 P. 995]; *Victor Oil Co. v. Drum*, 184, Cal. 226, 241 [193 P. 243]; *Lady Washington C. Co. v. Wood*, 113 Cal. 482 [45 P. 809]; *West v. Great Western Power Co.*, 36 Cal. App. 2d 403, 406, *et seq.* [97 P. 2d 1014]; *Denson v.*

Pressey, 13 Cal. App. 2d 472 [57 P. 2d 522]; Edwards v. Sergi, 137 Cal. App. 369 [30 P. 2d 541]; *cf.* Smith v. Martin, 135 Cal. 247, 254-255 [67 P. 779].) In many cases it has been said that means of knowledge are equivalent to knowledge. (See Shain v. Sresovich, 104 Cal. 402, 405 [38 P. 51]; People v. San Joaquin etc. Assn., 151 Cal. 797, 807 [91 P. 740]; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 701 et seq. [16 P. 2d 268]; Knapp v. Knapp, 15 Cal. 2d 237, 242 [100 P. 2d 759]; Bainbridge v. Stoner, 16 Cal. 2d 423, 430 [106 P. 2d 423]; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal. App. 149, 158 [7 P. 2d 329]; Daily Tel. Co. v. Long Beach Press Pub. Co., 133 Cal. App. 140, 143-147 [23 P. 2d 833]; Wheaton v. Nolan, 3 Cal. App. 2d 401, 403 [39 P. 2d 457]; Haley v. Santa Fe Land Imp. Co., 5 Cal. App. 2d 415, 420, 423 [42 P. 2d 1078]; Vertex Inv. Co. v. Schwabacher, 57 Cal. App. 2d 406, 415-418 [134 P. 2d 891]; Bryan v. Nicolas, 67 Cal. App. 2d 898 [155 P. 2d 835]; *cf.* Truett v. Onderdonk, 120 Cal. 581, 589 [53 P. 26]; Phelps v. Grady, 168 Cal. 73, 79-80 [141 P. 926]; Malone v. Clise, 18 Cal. App. 2d 154, 157 [63 P. 2d 321].) This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. In the Lady Washington case, the court said (113 Cal. at p. 487) that ‘as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry* which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.’ (Italics added.)

“The reason for the rule is well stated in *Victor Oil Co. v. Drum*, *supra* (184 Cal. at p. 241): ‘The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.’ It follows that plaintiff is not barred because the means of discovery were available at an earlier date *provided* he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period ending June, 1941.

“The record in this case contains a most complete presentation of all relevant circumstances that might have a bearing upon this question up to and including the completion of the transaction in January, 1936. Most of these factors have been discussed heretofore in connection with the sufficiency of the evidence to establish a cause of action for fraud. The problems there considered, however, did not directly concern ordinary *negligence* by plaintiff, since this would not be a defense to an action based upon intentional misrepresentation. (See *Seeger v. Odell*, 18 Cal. 2d 409, 414 [115 P. 2d 977, 136 A. L. R. 1291].) Accordingly, we must now determine whether plaintiff has brought himself within the exception to the statute of limitations. Plaintiff’s evidence, if believed, disclosed certain factors that may have tended to discourage the making of an

exhaustive independent investigation, and we cannot hold, as a matter of law, that any of the circumstances known to plaintiff should have put a reasonably prudent man upon inquiry. The jury could have found that Greene's representations were of such a nature as to lull plaintiff into a sense of security or state of inaction,—an important factor to be considered in determining whether or not plaintiff was negligent in failing to investigate. (See, for example, *Denson v. Pressey*, 13 Cal. App. 2d 472, 476 [57 P. 2d 522]; *Edward v. Sergi*, 137 Cal. App. 369 [30 P. 2d 541].)

“Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required. In *Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 486 [80 P. 2d 978, 117 A. L. R. 383], it was said that because of such a relationship plaintiff could not be charged with lack of diligence even though an inquiry would have disclosed the true value of the property involved. (See, also, *Bainbridge v. Stoner*, 16 Cal. 2d 423, 430 [106 P. 2d 423]; *Knapp v. Knapp*, 15 Cal. 2d 237, 242 [100 P. 2d 759]; *Lataillade v. Orena*, 91 Cal. 565 [27 P. 924, 25 Am. St. Rep. 219]; *Laraway v. First Nat. Bk. of La Verne*, 39 Cal. App. 2d 718 [104 P. 2d 95]; 12 Cal. Jur. 799; (1942) 30 Cal. L. Rev. 589, 591; *cf. Marston v. Simpson*, 54 Cal. 189; *Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 575-577 [126 P. 351, 42 L. R. A. N. S. 125].) Defendants

argue that the fiduciary relationship terminated when the sale was completed and that plaintiff was no longer entitled to the benefit of the rule. *The relationship, nevertheless, did exist at the time of the asserted fraud, and plaintiff was under no duty to make a complete search and re-examination of the entire transaction immediately after it took place merely because the fiduciary relationship between the parties was terminated thereby.* Under these circumstances, it was for the jury to determine whether it was negligence for plaintiff, after completion of the transaction, to continue to rely upon the representations that were made while he was a stockholder. (Italics added.)

“Defendants contend, however, that certain facts indisputably known to plaintiff were sufficient to put him on inquiry. These contentions must be examined in the light of the rule announced in *Northwestern P. C. Co. v. Atlantic P. C. Co.*, 174 Cal. 308, 312 [163 P. 47]. The court there said that when the facts are susceptible to opposing inferences, whether ‘a party has notice of “circumstances sufficient to put a prudent man upon inquiry as to a particular fact,” and whether “by prosecuting such inquiry, he might have learned such fact” (Civ. Code, Sec. 19), are themselves questions of fact to be determined by the jury or the trial court.’ (See, also, *West v. Great Western Power Co.*, 36 Cal. App. 2d 403, 411 [97 P. 2d 1014]; 20 Cal. Jur. 240). The facts mentioned by defendants have been discussed and analyzed heretofore in connection with the contention that the evidence is insufficient to establish either actionable misrepresentation or plaintiff’s reasonable reliance thereon, and we shall not repeat them here. Although the jury

could properly have concluded that knowledge of these facts and others urged by defendants should have put a prudent man on inquiry, we are satisfied that none of the matters admittedly known to plaintiff up to and including the time of completion of the transaction compelled such a conclusion as a matter of law.

“The evidence is clearly sufficient to support the implied finding of the jury that plaintiff learned nothing to arouse his suspicions during the period between the completion of the transaction and the alleged discovery of the fraud in 1941. The record shows that plaintiff went to Europe some time in 1936 and remained there until January of 1941, when he returned to New York. He testified that prior to that time he had no information, nor had anything come to his attention, that would make him suspect that he had been ‘overreached’ in the transaction, or had not received the full value of his stock, or had been defrauded. Although absence from the locality would not toll the statute of limitations if it had already commenced to run (for example, if plaintiff had been put on inquiry by facts known to him prior to his trip to Europe), it was a relevant factor to be considered by the jury in explanation of the delay in discovery. (See *Seeger v. Odell*, 18 Cal. 2d 409, 418 [115 P. 2d 977, 136 A. L. R. 1291]; cf. *Teats v. Caldwell*, 28 Cal. App. 206, 210 [151 P. 973].

“Defendants contend, next, that plaintiff has not established sufficient facts relating to the claimed actual discovery of the fraud in 1941. In addition to negating notice of the fraud and excusing failure to discover it sooner, plaintiff must allege and prove facts showing the time and surrounding cir-

cumstances of the discovery and what the discovery was. (See *Davis v. Rite-Lite Sales Co.*, 8 Cal. 2d 675, 681 [67 P. 2d 1039]; *Kelly v. Longan*, 5 Cal. 2d 274, 276-277 [53 P. 2d 971]; *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 703 [16 P. 2d 268]; *Original Min. & Mill. Co. v. Casad*, 210 Cal. 71, 75 [290 P. 456]; *Victor Oil Co. v. Drum*, 184 Cal. 226, 241 [193 P. 243].)

“In applying this rule it is important to recognize the distinction between cases where the plaintiff is under a duty to inquire and those in which he is not obliged to make any investigation until he has notice or knowledge of the happening of some incident or of some fact or facts sufficient to arouse the suspicions of a reasonable person. Where there is a duty to investigate, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation; but where, as here, there is no prior duty to investigate, the statute does not run until he has notice or knowledge of facts sufficient to put a reasonable man on inquiry. The rule that the plaintiff must show what information he has obtained, so that the court may determine whether or not the facts leading to the discovery of the fraud existed for more than three years prior to the commencement of the suit and could have been discovered by the exercise of ordinary diligence, is applicable only where the plaintiff was under a duty to make a diligent inquiry and he seeks to excuse his failure to discover the fraud by showing that the true facts were not then available or that the inquiry he did make was diligent, though unsuccessful. (See *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 703-704 [16 P. 2d 268]; *cf.* *Phelps v. Grady*, 168 Cal. 73, 77-78 [141 P. 926]; *Wood v. Carpenter*, 101 U. S. 135, 140 [25 L. Ed.

807].) In the absence of a duty to make inquiry, as pointed out above, the statute does not run merely because the means of discovery were available, and plaintiff is not compelled to disprove that such means existed. He need only establish facts sufficient to show that he made an actual discovery of hitherto unknown information within three years before the filing of the action. In the Scarborough case, *supra*, the plaintiff merely showed that, after a lapse of more than the statutory period, an investigation was made which led to discovery of the fraud, but there was no showing of the reasons which prompted the investigation. As the court there pointed out (216 Cal. at p. 704), for all that appeared the plaintiff may have had prior knowledge of the suspicious facts, and there was no showing why an earlier investigation was not made. The requirement that plaintiff show what information he received or what suspicious facts came to his notice is imposed in order that the court may determine whether or not the discovery was made within the time alleged, that is, whether plaintiff actually learned something he did not know before. (Lady Washington C. Co. v. Wood, 113 Cal. 482, 487 [45 P. 809]; Victor Oil Co. v. Drum, 184 Cal. 226, 241 [193 P. 243]; Galusha v. Fraser, 178 Cal. 653, 657 [174 P. 311].) In the Lady Washington case, at page 487, the court said that the plaintiff must 'show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, *so that the court may determine whether the discovery of these facts was within the time alleged.*' (Italics added.)

"The pleading on this point is sufficient. The amended complaint alleges that plaintiff had no prior knowledge that any fraud had been perpetrated; that in February, 1941, he had a conversation with

a man in New York who informed him that after plaintiff had left for Europe in 1936, Charles Crocker had stated that in the settlement of the will contest Greene and Crocker's lawyer had gotten together and had given plaintiff a 'fearful trimming,' and that, as a part of the settlement of the contest, plaintiff had sold his stock to them for \$25 a share when its actual value was at least \$120 a share; that about two months thereafter he came to San Francisco and consulted with Aureguy, Harris and his present counsel; and that in the early part of May, 1941, his counsel 'informed him that he had procured information that the Hobart Estate Company was and apparently had been for several years in excellent financial condition and owned numerous valuable properties which were unencumbered.'

"Although the supporting evidence is less detailed than the allegations, it is sufficient to bring plaintiff within the rule above stated. He testified, in substance, that upon his return to New York in January, 1941, he received 'some information . . . or suggestion' from an unidentified person concerning the holdings of the Hobart Estate Company that was at variance with Green's representations; that prior to that time he had no information, nor had anything come to his attention, that would make him suspicious that he had been defrauded; that as soon as he was able to come to San Francisco and consulted Aureguy, Harris and his present counsel; and that he then received information as to the nature and value of the company's holdings, and the status of encumbrances, that was excessively at variance with the statements made to him by Greene. Plaintiff offered no further evidence in support of the allegation regarding the conversation in New York, and it is obvious from the record that his counsel

did not ask him to state the details of the information received, fearing that a recital of what plaintiff learned might be inadmissible hearsay.

“Plaintiff has thus shown that he had no notice or knowledge of any suspicious facts or circumstances prior to January, 1941, that at that time he was first put on notice of possible fraud, and that within six months thereafter he made an investigation, discovered the fraud, and commenced the action. It follows, therefore, that he has brought himself within the exception to subdivision 4 of section 338 of the Code of Civil Procedure and that he is not barred by the statute of limitations.”

From the foregoing, we especially stress:

“Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship, [fiduciary] facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required.” (P. 440.)

Also:

That is the case here.

“ ‘The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded on the ground for sooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.’ It follows

that plaintiff is not barred because the means of discovery were available at an earlier date provided he has shown that he was not put on inquiry by any circumstances known to him or his agent at any time prior to the commencement of the three year period ending June, 1941."

The picture presented here is of a stranger coming from Utah to California, without knowledge of the California Corporate Securities Act [R. 7-8]. In June of 1947, the Reypo Corporation was desperate for funds. This is obvious from every assertion in the complaint. The corporation then had a permit for the issuance of shares under certain conditions. The defendants "sold" 10,000 shares of the stock to the plaintiff [R. 5-6]. \$10,000.00 was paid. *No part of the \$10,000.00 was put in the depository required by the then existing permit to issue stock* [R. 6]. The money was used for corporation purposes [R. 6]. The plaintiff trusted his associates; he accepted the corporate note. *Immediately*, the associates went to work and caused the corporation in June of 1947, to make a new application for a permit to issue stock. This permit was issued in September of 1947, and the Corporation Commissioner permitted the shares to be *issued for cash*. No shares were actually issued until December of 1947, when the plaintiff turned in his note, received the shares of stock and received a "check" [R. 44] for \$10,000.00 [R. 44]. He immediately endorsed and returned this "check" to the Reypo Corporation. The Corporation never cashed, never negotiated it. No bank ever cashed it or punched its canceling "PAID" therein.

It is this thinly veiled subterfuge which consummated the fraud.

As to discovery thereof, from the Complaint, Best worked for the corporation first as its sales representative in the field, in fact this was all the active work that he ever did except during the time when he was working in the factory. Otherwise, he became a member of the board of directors in January of 1948, and remained such until November of 1948, when the corporation went through bankruptcy. In December of 1947, he had learned of the precarious financial condition of the corporation and thereafter spent all of his best efforts and his best time in endeavoring to sell his products and thus pull it out of the financial hole that it was in.

Albeit he was a director and secretary-treasurer of the corporation from January to November, 1948, nevertheless it is clear from the complaint that this phase of his activities occupied only a small portion of his time.

A fiduciary relationship existed from the defendants toward plaintiff from the time in June of 1947, when he parted with \$10,000.00 until the bankruptcy—at least—for the defendants were corporate directors and he had bought stock.

That he trusted his associates is unquestioned; they were co-directors; all were engaged in a business. All were co-workers with respect to the business, so that the plaintiff at no time had any suspicion that a spurious trick had been played upon him. He was never suspicious as to the application which had been made before the Corporation Commissioner in June of 1947 (simultaneously with his having paid the \$10,000.00); in fact, he knew nothing about that application until his attorneys told him about it in the fall of 1951, and he had no reason to suspect its existence.

The first time that he ever received actual custody of the books and records was in November of 1948, when he was instructed by resolution to cause a voluntary petition in bankruptcy to be filed. For the years thereafter until 1951, when he actually discovered the existence of the permit, he was busy trying to rebuild his life. But since the action was filed in October, 1951, we need only inquire back to October, 1948.

It is under these circumstances that the lower court has held that the plaintiff was charged with *constructive knowledge* of the “fact constituting the fraud.”

Albeit plaintiff was undoubtedly an officer of the corporation and a director, it is respectfully submitted that his position at all times was such that he was entitled to trust the defendants in this action as his co-directors; that the fiduciary relationship toward him existed when they sold him the stock, and that he was under no duty to plow through the books and records of the corporation looking for some malfeasance on their part, when his full time was occupied trying to put the corporation back upon its financial feet.

“Forsooth he did not discover that he had been cheated as soon as he might have.” The lower court’s ruling makes diligence no longer a virtue. The plaintiff has spent his time working for the welfare of the defendants who defrauded him. If the ruling of the lower court be allowed to stand he will be punished for such diligence and trust toward his business fiduciaries.

It is submitted under all the circumstances shown in this case by the Second Amended Complaint, that plaintiff Howard Best was not charged constructively with notice, due to the fiduciary relationship which patently existed, and due to his own diligence in prosecuting the welfare of the corporation at the expense of his own individual interest.

The judgment of the lower court and the order dismissing the action should be reversed and the defendants should be held to answer to the Second Amended Complaint.

Respectfully,

GEORGE R. MAURY,

Attorney for Appellant.

